135-232

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 284.

JOSEPH LODGE AND SAMUEL BEAUMONT, APPELLANTS,

vs.

AMANDA TWELL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED JANUARY 10, 1887.

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1 In the District Court of 2nd Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL
vs.
RICHARD TWELL *et al.*

Statement on Appeal.

The cause came on for trial on the pleadings herein set forth.

2 *Complaint.*

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

Now comes the above-named plaintiff and for cause of action against the above-named defendants complains and alleges that on the 17th day of December, 1883, at a regular term of this court, held in Deer Lodge county, Montana Territory, in an action wherein this plaintiff was plaintiff and the defendant, Richard Twell herein, was defendant, a decree of said court was made and entered in the words and figures following, to wit:

"In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory. December Term of Court, 1883.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, Def't.

3 This action having come on regularly for trial on the 17th day of December, A. D. 1883, before a jury regularly impanelled and sworn, the plaintiff appearing by W. W. Dixon and H. R. Whitehill, her attorneys, and the defendant by Thomas L. Napton, his attorney, and the jury having heard the evidence and arguments and being instructed by the court and having duly rendered their verdict and findings in answer to the questions and issues submitted to them by the court, which verdict and findings are herein filed and entered, and the court having adopted as its own the said verdict and findings of the jury, and being fully advised in the premises, it is ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between plaintiff and defendant be dissolved and that they be fully divorced from each other, and the court, having examined the case and being advised in the premises, finds that fifty (50) dollars per month is a fit, rea-

sonable, and just sum to be allowed plaintiff for her alimony and maintenance. It is therefore ordered, adjudged, and decreed
4 by the court that defendant pay to plaintiff during her natural life or until the further order of this court the sum of fifty (50) dollars per month, the first payment to be made on the day of the date of this decree and subsequent payments on the same date of each month thereafter.

It is further ordered, decreed, and adjudged by the court that defendant, within 15 days from the date of this decree, give security for the payment of said sums decreed to plaintiff for alimony and maintenance, as above mentioned, to plaintiff, by executing to plaintiff and filing in this court a bond, with two or more sufficient sureties, said bond and sureties to be approved by John C. Robinson, Esq., who is hereby appointed by the court a master in chancery for that purpose, in the sum of five thousand (5,000) dollars conditioned for the payment by defendant to the plaintiff of the said sum of fifty (50) dollars per month, as herein ordered to be paid. It is further ordered, adjudged, and decreed that upon the failure of the defendant to give said bond as above provided
5 within said 15 days from the date of this decree he be adjudged guilty of contempt of court, and that such proceedings may thereupon be had to enforce and secure the payments of said sums allowed for alimony and maintenance as may be necessary and proper and according to the practice of the court in such cases. It is further ordered, adjudged, and decreed that the court may make such alterations in the allowment for alimony and maintenance herein provided as shall appear reasonable and just, and may require defendant to give other and further or additional security for the payment of such alimony and maintenance as of that herein allowed.

It is further ordered and decreed by the court that the motion of plaintiff hereinbefore filed for an order on defendant to pay plaintiff temporary alimony and costs and expenses of suit, including counsel fees, be sustained so far as relates to counsel fees, and that defendant pay forthwith to plaintiff, as her counsel herein, the sum of two hundred (200) dollars on account of counsel fees, and on his failure to do so that he be adjudged guilty of contempt
6 of court.

It is further ordered, adjudged, and decreed that plaintiff have and recover of defendant her costs of this action, taxed at forty-one $\frac{55}{100}$ dollars, and she have execution therefor.

Dated this 17th day of December, A. D. 1883.

WM. J. GALBRAITH, *Judge.*"

That the defendant, the said Richard Twell, has failed to obey the said decree in this, that he has not paid the monthly installments for alimony and maintenance now due as provided for in said decree, and has utterly failed to give the security ordered in said decree for the payment of said alimony and maintenance or any security whatever, but on the contrary has departed from the Territory of Montana without making any provision whatever for the payment to plaintiff of said alimony and maintenance as provided

for in said decree, and that his whereabouts are unknown to this plaintiff; that there is now due to plaintiff from the said Richard Twell the monthly installments of $50.00 each ordered
7 in said decree to be paid on the 17th days of the months of January, February, and March of the year 1884, amounting in all to the sum of $150.00; that said sum remains wholly unpaid, and that plaintiff has no security for the payment to her by the said Richard Twell of said amount; that on the 22d day of December, A. D. 1883, or about the time the said Richard Twell was the owner of and possessed of certain real estate of the value of about $1,200 and of certain personal property consisting of promissory notes, Deer Lodge county script and credits, horses, wagons, household furniture, implements, and utensils of various kinds, all of the value of about $5,000; that on or about the said 22nd day of December, A. D. 1883, and after the entry of the aforesaid decree of this court, the said defendant, the said Richard Twell, in contemplation of a departure from the said Territory of Montana for the purpose of evading the payment of the sums of money ordered in said decree and — avoid the process of this court for the enforcement of said decree, made a pretended sale and assignment of his said property to the defendants,
8 the said Joseph Lodge and Samuel Beaumont; but for what exact amount this plaintiff does not know and cannot state; that on the said 22d day of December, 1883, the said defendant, the said Richard Twell, executed and delivered to the defendants, the said Joseph Lodge and Samuel Beaumont, an instrument in writing, of which the following is a copy, to wit:

This indenture, made this the 22nd day of December, in the year of our Lord one thousand eight hundred and eighty-three, between Richard Twell, party of the first part, and Joseph Lodge and Samuel Beaumont, the parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of twelve hundred dollars, lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the parties of the second part and to their heirs and assigns forever the following-described real estate, to wit: Lot
9 number one (1), in block number fifteen (15), and lots number four and five (4 & 5), in block number five (5), of the town of Deer Lodge, in the county of Deer Lodge and Territory of Montana, said lots being numbered according to the official plat of said town on file in the office of the recorder and clerk of said county, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also all estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all

and singular the said premises, together with the appurtenances, unto the said parties of the second part and to their heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

RICHARD TWELL. [SEAL.]

10 Signed, sealed, and delivered in the presence of—
GEORGE S. MILLER.
LEW. COLEMAN.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

On this 22d day of December, A. D. 1883, personally appeared before me, a notary public in and for the Territory of Montana, Richard Twell, personally known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

Witness my hand and official seal, a notary public, the day and year above written.

[NOTARIAL SEAL.] WM. H. TRIPPET,
Notary Public.

Filed for record Dec. 27, 1883, at 12 minutes past 1 o'clock p. m.
THOMAS WARD,
County Recorder.

That the property so sold and assigned is of the value of
11 about $6,200.00; that the said sale and assignment of said property to the said Joseph Lodge and Samuel Beaumont were fraudulent and void as against plaintiff, and were intended and made for the purpose of delaying, hindering, and defrauding her by putting it out of her power to enforce her rights under the aforesaid decree; that the said Lodge and Beaumont knew of the said decree of this court, and knew that the said Twell was disposing of his property to evade payment of said decree, and sold and assigned to them the said property to prevent the aforesaid decree from being enforced.

That the said Lodge and Beaumont knew that the said Twell intended to leave the country to avoid the process of this court, and bought and consented to the assignment of said property to them for the purpose of enabling the said Twell to leave the country, and to prevent the said decree from being enforced and defraud of the rights of this plaintiff under the said decree, and to hinder, delay, and defraud her in enforcing the said decree.

12 That the defendant, Richard Twell, has not any property within the jurisdiction of this court other than that embraced in the sale and assignment aforesaid, of which the said $150 now due and the other sums to become due on said decree could be satisfied and paid in whole or in part; and unless the said property can be applied to the payment of the sums now due and hereafter

to become due in said decree, the same must remain wholly unpaid. Wherefore the plaintiff demands judgment—

1. That the said sale and assignment by the defendant, Richard Twell, to the said Joseph Lodge and Samuel Beaumont may each be declared fraudulent and void as against this plaintiff.

2. That a receiver of all the property and effects of the said Richard Twell which have at the time of the entry of said decree of divorce and at the time of the said sale and assignment to the defendants, the said Joseph Lodge and Samuel Beaumont, or at any time thereafter — be appointed.

3rd. That the defendants, Joseph Lodge and Samuel Beau-
13 mont, be adjudged to account for all the property received by them under either the sale or assignment aforesaid, and for all proceedings arising from any and all sales thereof, and for the rents, issues, and profits thereof, and deliver the same to such receiver.

4. That the defendants be in the meantime enjoined from disposing of any of said property or paying away any of the proceeds thereof or in anywise interfering therewith.

5. That the said receiver be directed to sell the said property and to pay out of the proceeds the said sum of $150.00 now due and all other sums that may be due and unpaid to plaintiff under said decree of divorce at the time of said sale, and the costs and expenses of this action, and hold the balance subject to the order of this court to be paid on the aforesaid decree.

6. For such other and further relief as to the court may seem fit, and meet in the premises.

W. W. DIXON & H. R. WHITEHILL,
Att'ys for Plaintiff.

14 TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

H. R. Whitehill, being first duly sworn, says as follows: I am one of the attorneys of the plaintiff in this action. I have read the foregoing complaint and know the contents thereof, and that the facts therein stated are true, to my best knowledge, information, and belief. The reason this verification is not made by the plaintiff is that she is not within the county of Deer Lodge, which is the county wherein I reside.

H. R. WHITEHILL.

Subscribed and sworn to before me this 11th day of April, A. D. 1884.

R. L. DAVIS, *Clerk.*

To this complaint defendants, Lodge and Beaumont, presented the following demurrer, to wit:

15 In the District Court, 2d Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

Now come the above-named defendants, Joseph Lodge and Samuel Beaumont, and demur to the plaintiff's complaint filed herein, and for cause of demurrer assign the following:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint is ambiguous, unintelligable, and uncertain in this: It does not appear from said complaint by whom the promissory notes were made, the dates, the amounts, or value thereof; nor are the dates, numbers, or amounts, or value of the county scrip mentioned in the said complaint, nor the names of those to whom issued, nor the number of horses or wagons alleged to have
16 been sold by defendant, Richard Twell, to those defendants, or their value; nor is there any description of the furniture, implements, or utensils, or the value thereof, stated in said complaint.

THOS. L. NAPTON.

The court, however, overruled this demurrer; to which ruling defendants Lodge and Beaumont excepted.

Defendants Lodge & Beaumont then, on the 26th day of April, 1884, file- the following separate answer:

In the District Court of the Second Judicial District in and for Montana Territory, County of Deer Lodge.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL *et al.*, Defendants.

Now come the defendants, Joseph Lodge and Samuel Beau-
17 mont, by their attorneys, Sharp & Napton and Knowles & Forbis, and, for their separate answer to plaintiff's complaint herein, — and deny—

1. That the said above-named defendant, Richard Twell, ever at any time, in contemplation of a departure from the Territory of Montana or otherwise or for the purpose of evading the payment of the sums of money ordered in said decree or otherwise to avoid the process of this court for the enforcement of said decree or otherwise, made a pretended sale or assignment of the property to these defendants.

2. That the sale and assignment of the property described in plaintiff's complaint to those defendants were fraudulent or void as against plaintiff, or that the same was intended or made for the purpose of delaying, hindering, or defrauding plaintiff by putting it out of her power to enforce her rights under said decree or otherwise.

3. That these defendants knew that the said def't Twell was disposing of his property to evade payment of said decree or
18 knew that he sold and assigned to them the said property to prevent the aforesaid decree being enforced.

4. That these defendants knew that the said Twell intended to leave the country to avoid the process of this court or for any purpose whatever, or that they bought or consented to the assignment of said property to them for the purpose of enabling the said Twell to leave the country or to prevent the said decree from being enforced, or in fraud of the rights of plaintiff under said decree or otherwise, or to hinder, delay, or defraud plaintiff in enforcing said decree, or any other wrongful purpose.

And for a further and a separate defense these defendants set forth that wherever the defendant, Richard Twell, may be he has plenty of funds and property with which to comply with the terms of said decree and out of which the same can be enforced, as defendants are informed and believe.

Therefore these defendants ask that they may be sent hence with their costs.

19 SHARP & NAPTON,
KNOWLES & FORBIS,
Att'ys for Def'ts Lodge & Beaumont.

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

Joseph Lodge, being first duly sworn, on oath doth depose and say that he is one of the defendants in the above action; that he has heard read the foregoing answer and knows the contents thereof, and that the facts therein stated are true, to his own knowledge, except as to those matters therein stated on their information and belief, and that as to those matters he believes it to be true.

JOSEPH LODGE.

Subscribed and sworn to before me this 28th day of April, 1884.
R. L. DAVIS, *Clerk.*

To this answer plaintiff made the following replication:

20 In the District Court, 2d Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
JOSEPH LODGE, SAMUEL BEAUMONT, and RICHARD TWELL, Defendants.

Now comes the above-named plaintiff and, replying to the answer

of defendants, denies, upon information and belief, that said defendant Twell has plenty or any funds or property with which to comply with the terms of the decree mentioned in the complaint or out of which the same can be enforced, and plaintiff avers that if said Twell has any such funds or property they are not nor is he within the jurisdiction of this court, as plaintiff is informed and believes.

W. W. DIXON,
H. R. WHITEHILL,
Att'ys for Plaintiff.

21 Upon the trial of this cause, by permission of court. defendants Lodge and Beaumont filed this amendment to their answer:

In the District Court, &c.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL *et al.*, Defendants.

Now comes the above-named defendants, Joseph Lodge and Samuel Beaumont, and, by permission of court, makes this amendment to their answer, and denies [deny] that the value of the property sold or assigned to these defendants, Lodge and Beaumont, as specified in plaintiff's complaint, was at the time of the purchase thereof of the value of six thousand two hundred dollars or any greater value than about three thousand five hundred dollars.

SHARP & NAPTON,
KNOWLES & FORBIS,
Att'ys for Lodge & Beaumont.

TERRITORY OF MONTANA,
County of Deer Lodge, } *ss:*

Here follows the usual verification of the defendants Lodge & Beaumont:

22 In the District Court of the 2d Judicial District of Montana Territory, County of Deer Lodge.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

This is an action, in the nature of a creditor's bill, brought to set aside the sale and conveyance of certain property specified in the complaint to the defendants Lodge and Beaumont by the defendant Richard Twell as fraudulent and void. A special reference to the complaint is here made for a statement of the nature of the action. The cause, being regularly called, was tried before the court, a jury having been expressly waived.

Thereupon the plaintiff introduced the following witness, JOSEPH LODGE, one of the defendants, who testified:

"I was acquainted with Richard Twell; I saw him last about three months ago at Bismarck; he wrote to me to come and see him. I have heard from him once since by letter from Wisconsin;
23 he was then at Melliland; this was some time in October. I saw him in September at Bismarck; he wanted me to come and see him; I owed him some money. I told him when I saw him about the suit—that we had been sued. It was Christmas last that I saw him the last time in this place. I saw him here on that day, but did not speak to him. I heard that he left that day. I did not know that he was going away; he did not tell me he was. The real estate he sold me is mentioned in a deed. He sold me some horses and a wagon; I don't know the number of horses; he did not know the number. I bought some notes; I did not figure up the amount of the notes. I got some county scrip, but did not figure up the amount. I purchased his household furniture; this was not worth much. I bought about two hundred pounds of grain; I bought four houses and the lots they were on; this is the real estate. We paid Twell three thousand dollars in money for the property, two thousand down and one thousand afterwards. I knew of the divorce proceedings between plaintiff and defendant, Richard
24 Twell. I was a witness in that case. I knew that a decree had been entered against Twell for the payment of alimony to plaintiff, and that he was required by an order of the court to give a bond in the sum of $5,000.00 to secure the payment to plaintiff of the alimony. He asked me to go on the bond, which I refused to do. He said he could not give the bond required of him. I did not know he was going away. I knew about how many horses he had. I knew as well as he did. I did not figure up the amount of the notes or of the scrip at the time of purchase. He wrote to me he wanted me to come and see him at Bismarck. He paid my expenses. I told him when I saw him in Bismarck about this suit. I paid him five hundred dollars of the money on this sale after the suit was commenced. I got a letter from him in October. I do not now know what was in the letter. I destroyed it. I did not know he was going away at the time he sold me this property. He told me he wished to sell to enable him to settle the decree with his wife and be done with it. I never took any
25 advice from Mr. Napton about the sale. I asked Mr. Trippet at the time of the sale if Twell could sell the property, and he said yes. I don't know why I asked him except I wished to know. I have sold the scrip I got. I don't know now how much I got for it. I had other scrip besides this lot. Some of my scrip I paid as our taxes and some I sold to the county treasurer of this county. I had a note I got of Twell against Thomas C. Irvine of $300.00 and over; one against Ed. Irvine for $100.00, and one against Tatro, the blacksmith, of $300.00, and a note against Jack Williams. I had no conversation that I remember with George Miller or Lew. Coleman about Twell going away or about this sale. I went to Butte

to see Napton about the sale after this suit was brought. I was not in Butte with Twell. Twell told me he had a right to sell the property. I do not know whether Twell took advice about this matter. I did not ask him as to that. I do not know how much money Twell had. He had some notes, and he said he was collecting up his notes at the time I purchased this property. I do not
26 know how much he was worth. He had the reputation of having eight or ten thousand dollars.

I never heard from Twell directly while he was gone until I heard from him at Bismarck. I heard he was in England. Twell and I were friends. We were both born in England. Twell owed me for hay and ranching about $100.00.

This was taken out of the $2,000.00. There was no agreement when the $1,000.00 was to be paid. It was to be paid as soon as we got the money, and from any source we could get it. There was no agreement that Twell was to have this property back. The furniture is up at our house.

There were four houses. Two we have rented for about $20.00 per month each. The others we rented; one about one month for $6.00, and paid out that sum for repairs.

Here is a list of the notes I got. Some I have collected a little interest on. These are all the notes I have, and here is a memorandum of the notes paid and unpaid. Some of these notes are not worth their face; some are worth nothing. Some of the notes I got I collected.

27 I got between five and six hundred dollars worth of scrip. The notes on their face amounted altogether to $2,930.00. The scrip was in addition to this.

Cross-examination:

The amount of the notes which I considered good and those I have collected are of the value of $2,080.00. There was a mistake in the figures I gave above. The cayuses were five or six wild cayuses, unbroken. They would not bring over from $100.00 to $125.00 altogether. The houses had to be repaired. We have paid out about the amount we have received in rent for repairs. The houses are in that part of town where only women of bad reputation live. The horses used in the team are not worth over $200.00 and the wagon $75.00 or $80.00. A new wagon of the kind can be got for $90.00. The wagon had been used; and in the woods Twell talked to me several times about buying the property. I talked to my partner about buying it, and he at first opposed it. Finally I told him I thought there was money in it and he consented.
28 I thought Twell had money enough to settle everything. I did not know Twell was going to leave the country. I have known Twell for a number of years. He cannot write and cannot read writing. The letter I received from him was written by some one else. I did not know what he wanted of me at Bismarck, except to talk about his wife and his troubles. I told him all about this suit. I examined the notes and the scrip at the time of the

sale and knew generally about the amount of the notes and about the amount of the scrip."

Redirect:

"I do not know whether or not the note of Jack Williams is worth anything or not. Five hundred of the $1,000 we owed Twell I paid to Napton before this suit was commenced on an order from Twell."

SAMUEL BEAUMONT, being sworn, testified: "I and Lodge are partners. We have been partners for fifty years. I knew Twell; he left here on last Christmas Day. He told me two hours before he left he was not going away; he said he was going to Butte, and would be back in a few days. I knew Twell for eight or ten
29 years; we were friends, but not intimate friends. I knew nothing about his business. He talked to me as well as to Lodge about buying this property, and said he wanted money to settle the suit against him by his wife—the divorce suit. I was a witness in the case of Twell *vs.* Twell for divorce, and knew that a decree had been entered in favor of the plaintiff. I knew that Twell was required to give a bond in the sum of $5,000.00 to secure the payment to Mrs. Twell of $50.00 per month alimony. Twell wanted Lodge and myself to go on the bond, which we refused to do. He said he could not give the bond, as no one would go on that kind of a bond. He said he had been trying to get the bond. I did not know he was going to leave. He said the day he left that he was not; that he was going to Butte, and would be back. He told me before we purchased the property and when he wanted us to purchase it that he was not going away, but wanted money to settle his suit with his wife."

BEAUMONT recalled:

"I know the cayuses we bought of Twell; they were not
30 worth much. Twell paid Valiton for them $12.50 each. They are not worth as much now as they were one year ago. All the horses, team and wagon, could not be worth over $400.00. The houses are in a disreputable part of town. I would not give anything myself for them if I had to collect the rent and look after them. There must have been from $500 to $600 worth of scrip. I never saw the notes until yesterday. We looked over the scrip. Lodge called of- the numbers. Twell told me before this trade that he was not going away. I asked him directly. His word was good to me. I believed him fully. I did not at first wish to go into this trade, but finally I consented for Mr. Lodge to make it. The money we paid was our own money. Some we borrowed from a man working for us and some we had."

LEW. COLEMAN, sworn, and testified:

"I have lived in Deer Lodge about 15 years. I knew Twell for

about 14 years. He paid taxes on not to exceed $10,000.
31 The houses are down in a part of town where whores live. I should say that the value of those houses are not to exceed from $800 to $1,000. I know nothing of the value of Twell's property but what he listed for taxation."

The court finds the facts, in addition to the facts admitted by the pleadings, to be as follows:

1. That the property sold by defendant Twell to defendants Lodge & Beaumont was, at the time of said sale, of the value of at least $4,200.00, and that defendants Lodge and Beaumont have realized from the personal property sold since said sale the sum of about twenty-five hundred dollars, and still have all the real estate and personal property, of the value of at least $600.00, in their hands.

2. That said sale to said Lodge & Beaumont was made by
32 defendant Twell with the intention and for the purpose of hindering, delaying, and defrauding plaintiff in the enforcement of the decree mentioned in the complaint and in the collection of the money therein ordered to be paid by defendant Twell.

3. That at the time of said sale defendant Twell and said Lodge & Beaumont were and for 8 or 10 years before had been friends and were fellow-countrymen, all being of English birth.

4. That at the time of said sale said Lodge & Beaumont knew of the decree mentioned in the complaint and of the liability of defendant Twell thereunder.

5. That at the time of said sale said Lodge & Beaumont put the valuation of $1,200.00 upon the real property sold, but made no estimate of the value of the personal property, and did not estimate the notes or county scrip sold and did not know how many bonds they were to receive.

33 6. That at the time of said sale said Lodge & Beaumont knew that said defendant Twell could not give the bond required by the decree, and that he was at the time selling or endeavoring to sell his other personal property besides that sold to Lodge & Beaumont.

7. That said defendant Twell really left Montana Territory within two or three days after the sale to Lodge & Beaumont, and has never since been within said Territory, and did not leave and has not now in said Territory any property whatever.

8. That the terms of the sale from said defendant Twell to said Lodge & Beaumont were that said Lodge & Beaumont should pay Twell $3,000.00 for the whole property; that they paid said Twell at the time $1,900.00 in money and $100.00 by giving said Twell credit for that amount, which he owed them, and agreed to pay the other $1,000.00 when able, no definite time for the last payment being agreed upon.

34 9. That after said Twell had left the country and about January, 1884, said Lodge & Beaumont paid $500.00 to Thomas L. Napton on an order from said defendant Twell.

10. That afterwards and after the commencement of this action

in October, 1884, at the request of defendant Twell, by letter to defendant Lodge, said Lodge went to Bismarck, in Dakota Territory, and there met said Twell and paid him the balance of $500.00 on said sale.

11. That at the time said Lodge & Beaumont paid said order to said Napton they knew that defendant Twell had absconded and sold his property with intent to defraud plaintiff, and they knew the same facts and had been served with summons in this action before they made the payment at Bismarck, Dakota Territory.

12. That from all the circumstances and facts in the case defendants Lodge & Beaumont, as men of ordinary prudence and sagacity, had reasonable cause to believe and know and to
35 suspect, at the time of said sale to them, that said Twell made said sale with intent to hinder, delay, and defraud plaintiff in the enforcement and collection of her decree herein and the money due and to become due thereon.

13. That said sale was fraudulent and void and made with intent to hinder, delay, and defraud plaintiff as aforesaid.

The court finds, as conclusion of law, that plaintiff is entitled to the relief asked in her complaint herein.

Dec. 27, 1884.

WM. J. GALBRAITH, *Judge.*

Thereupon the defendants filed their motion for judgment in words & figures following, to wit:

36 *Defendants' Mo. for Judgment.*

In the District Court, 2nd Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

Now come the defendants Lodge & Beaumont and move the court for judgment for their costs herein expended, notwithstanding the findings of the court, for the following reasons, to wit:

1. That the complaint does not state facts sufficient to constitute a cause of action or to entitle plaintiff to the relief therein prayed for or any relief whatever.

2. That the findings of fact by the court do not show that the plaintiff had any lien upon any portion of the property therein sought to be subjected to plaintiff, either by attachment or judgment or otherwise.

3. That findings numbered 3 and 5 are findings of conclu-
37 sions of law and statements of evidence and not of fact and do not warrant any judgment whatever without the facts stated upon which to base the same.

4. That there is no evidence upon which to base findings numbered 2 and 11, for the reason that no witness testified that the sale by

Twell to Lodge & Beaumont was not taken by the said Lodge & Beaumont in good faith regardless of what Twell's intentions may have been.

KNOWLES & NAPTON,
Att'ys for Def'ts Lodge & Beaumont.

To H. R. Whitehill and W. W. Dixon, att'ys for plaintiffs:

Take notice that the above-named defendants will call up for a hearing the above motion at 2 o'clock p. m. May 4, 1885, or as soon thereafter as counsel can be heard in open court.

KNOWLES & NAPTON,
Att'ys for Def'ts Named.

Service accepted and copy waived of the above notice and motion this 5th day of May, 1885.

DIXON & WHITEHILL,
Att'ys for Plaintiff.

38 Notice of the above motion was given on the motion book. This motion came on for hearing in open court on the 25th day of May, 1885, and the following journal entry made of the action of the court and def'ts' exception, to wit:

Order Overruling Def'ts' Mo. for Judgment.

AMANDA TWELL
vs.
RICHARD TWELL *et al.*

The motion of defendants for judgment in favor of defendants on the findings of the court herein is, upon consideration, overruled, and the decree in favor of plaintiff heretofore ordered is submitted, approved, signed, and ordered to be entered accordingly; to which said rulings of the court overruling said motion of defendants for judgment and ordering that a decree in favor of plaintiff be entered the defendants, by their counsel, then and there excepted.

39 We, the undersigned, att'ys for plaintiff and defendants named, do hereby certify that the foregoing statement of the evidence is correct and that the statement of the evidence therein set forth is all of the evidence given in the case and is correct. Dated June 26, 1885.

H. R. WHITEHILL,
One of the Att'ys for Pl'ff.
THOMAS L. NAPTON &
KNOWLES & FORBIS,
Att'ys for Def'ts Lodge & Beaumont.

Endorsed: Filed June 10, 1885. R. L. Davis, clerk.

40 *Errors of Law.*

The court erred in overruling defendants' demurrer filed in this cause; to which ruling defendants Lodge & Beaumont excepted.

2. The court erred in rendering judgment upon the complaint in this cause on the ground that the same does not state facts sufficient to constitute a cause of action.

3. The court erred in entering the decree made in this cause on the ground that the findings of fact do not show that the said plaintiff had any judgment which was a lien on any of the property described in the complaint or that she had in any manner any lien upon said property or a lien upon any property whatever.

4. That what purports to be findings of fact from and including No. one to and including finding No. ten are not findings of fact, but only statements of evidence, and should not have been found as facts; they are not findings upon which any decree could be based.

41 The court erred in its conclusion of law that plaintiff was entitled to the relief demanded in her complaint or any part of it. The findings of fact did not show that she had any such standing as to permit her to attack the sale to defendants Lodge & Beaumont, as she is not shown to be a judgment creditor or to have any lien upon the property or any claim upon the same.

The findings of fact are insufficient to warrant the court in setting aside the sale of all the property specified in the decree.

That the court erred in overruling defendants' motion for judgment and in signing the decree in favor of plaintiff herein, as specified in defendants' exception on the journal of said court of May 25, 1885.

THOMAS L. NAPTON AND
KNOWLES & FORBIS,
Att'ys for Def'ts Lodge & Beaumont.

Endorsed: Filed June 10, 1885. R. L. Davis, clerk.

42 *Amendments to Statement on Appeal.*

Title of cause & court.

Proposed amendments of the plaintiff to defendants' statement on appeal.

1. (Erased.)

2. In the evidence of Joseph Lodge, after the words "and one thousand afterwards," insert as follows: "I know of the divorce proceedings between plaintiff and defendant, Richard Twell. I was a witness in that case. I knew that a decree had been entered against Twell for the payment of alimony to plaintiff, and that he was required by an order of the court to give a bond in the sum of $5,000.00 to secure the payment to plaintiff of the alimony. He asked me to go on the bond, which I refused to do."

3. In the evidence of Samuel Beaumont, after the words "the divorce suit," insert the following: "I was a witness in the case of Twell *vs.* Twell for divorce, and knew that a decree had been entered in favor of the plaintiff. I knew that Twell was required to give a bond in the sum of $5,000.00 to secure the payment to Mrs.
43 Twell of $50.00 per month alimony. Twell wanted Lodge and myself to go on the bond, which we refused to do. He said he could not give the bond, as no one would go on that kind of a bond. He said he had been trying to get the bond.

W. W. DIXON AND H. R. WHITEHILL,
Att'ys for Plaintiff.

Service of the foregoing amendments to defendants' statement on appeal accepted this — day of June, 1885.

KNOWLES & FORBIS,
Att'ys for Defendants Lodge & Beaumont.

The above amendments agreed to, and it is hereby stipulated that the same may be incorporated with original statement of evidence. June 24, 1885.

KNOWLES & FORBIS,
Att'ys for Lodge & Beaumont.
H. R. WHITEHILL,
One of Att'ys for Plaintiff.

Filed June 16, 1885. R. L. DAVIS, *Clerk.*

44 *Order Overruling Demurrer to Complaint.*

At a regular term of the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge, begun and held at the court-house, in said county, on Monday, the 21st day of April, A. D. 1885.

Present: Hon. William J. Galbraith, judge presiding; W. Y. Pemberton, district attorney; James B. McMaster, Esq., sheriff; Reuben L. Davis, clerk.

Amongst other proceedings the following were had, to wit:

SATURDAY, *April 26th*, 1885.

Title of cause.

The demurrer to the complaint herein is, upon consideration, overruled; to which ruling the defendants except, and the defendants, Joseph Lodge and Samuel Beaumont, are allowed until Monday, April 28, A. D. 1885, at 9 o'clock a. m., to file their answer to said complaint.

45 *Order for Default of Defendant Twell and Proceedings at Trial of Cause.*

In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Deer Lodge.

At a regular term of said court, begun and held at the court-house, in said county, on Monday, the 1st day of December, A. D. 1885.
Hon. William J. Galbraith, judge presiding.
" W. Y. Pemberton, district attorney.
James B. McMaster, Esq., sheriff.
Reuben L. Davis, clerk.
Amongst other proceedings the following were had, to wit:

ON SATURDAY, *December* 6, 1884.

Title of cause.

Now come plaintiff and the defendants, Samuel Beaumont and Joseph Lodge, by their counsel, and plaintiffs make proof of service of summons herein upon the defendant, Richard Twell, and move the court that the default of said defendant be entered; which said motion is sustained, and it is ordered that the default
46 of said defendant Twell be entered, and plaintiff is granted leave to file their substitute replication herein in place of lost replication formerly filed by them, and this cause comes regularly on for trial upon the complaint, answer, and replication herein, and, by consent of parties hereto, in open court, the right of trial of this cause by a jury is expressly waived, and witnesses, to wit, Joseph Lodge, Samuel Beaumont, Lew. Coleman, and George Miller, are sworn on the part of plaintiff, and, pending their examination, court adjourned until Monday, December 8, 1884, at 9 o'clock a. m.

MONDAY, *December 8th*, 1884.

Title of cause.

Now again come counsel for plaintiff and defendants Lodge & Beaumont and the trial of this cause is resumed, and witnesses are examined and the testimony is closed, and this cause is argued and submitted to the court and taken under advisement.

SATURDAY, *December* 27, 1884.

Title of cause.

47 This cause having heretofore been tried and submitted to the court and the court having considered matters finds for the plaintiff, which findings are submitted in writing and are ordered to be filed; and it is further ordered that judgment in favor of plaintiff be entered in accordance with said findings.

In the District Court of the 2d Judicial District, County of Deer Lodge, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL *et al.*, Defendants.

To H. R. Whitehill and W. W. Dixon:

You will hereby take notice that defendants Lodge and Beaumont have this day filed in the above court their statement on appeal.

Dated this 11th day of June, 1885.

THOS. L. NAPTON AND
KNOWLES & FORBIS,
Att'ys for Lodge & Beaumont.

Service accepted & copy waived this 10th day of June, 1885.

H. R. WHITEHILL,
Att'y for Plaintiff.

Filed June 10, 1885.

R. L. DAVIS, *Clerk.*

48 *Defendants' Notice of Motion for Judgment.*

AMANDA TWELL
vs.
RICHARD TWELL *et al.*

To Dixon & Whitehill, att'ys for pl'ff:

You will hereby take notice that the defendants Lodge & Beaumont will move the court on the 4th day of May, 1885, for a judgment on the findings of the court in the above cause.

KNOWLES & FORBIS,
SHARP & NAPTON,
Att'ys for Def'ts.

49 *Order Overruling Defendants' Motion for Judgment and Order for and Approving Decree.*

At a regular term of the district court of the second judicial district of the Territory of Montana in and for the county of Deer Lodge, begun and held at the court-house, in said county, on Monday, the fourth day of May, A. D. 1885.

Present: Hon. Wm. J. Galbraith, judge presiding; W. Y. Pemberton, district attorney; James B. McMaster, Esq., sheriff; Reuben L. Davis, clerk.

Amongst other proceedings the following were had, to wit, on Monday, May 25th, A. D. 1885:

Title of cause.

The motion of defendants for judgment on the findings of the

court herein in favor of defendants is, upon consideration, overruled, and the decree in favor of plaintiff heretofore ordered is submitted, approved, signed, and ordered to be entered accordingly; to which said rulings of the court overruling the said motion of de-
50 fendants for judgment and ordering that a decree in favor of plaintiff be entered the defendants, by their counsel, then and there excepted.

In the District Court, 2d Judicial District, in and for Montana Territory, County of Deer Lodge, M. T.

AMANDA TWELL
vs.
RICHARD TWELL, JOSEPH LODGE, *and* SAMUEL BEAUMONT.

Be it remembered that the defendants Lodge & Beaumont, by their attorneys, before the decree was entered in this case, upon due notice, move the court for a judgment on the findings of the court herein on the ground that the said findings did not warrant the judgment or decree asked of the court in this cause, and upon due argument and upon due consideration the court finds that said findings are sufficient, and overruled plaintiff's motion for judgment; to
51 which ruling defendants Lodge & Beaumont, by their att'ys, Knowles and Napton, then and there excepted, and ask the court to sign this their bill of exceptions.

WM. J. GALBRAITH, *Judge.*

Deer Lodge, May 25, 1885.

Endorsed: Filed May 25th, 1885. R. L. Davis, clerk.

Decree.

In the District Court, 2d Judicial District, Deer Lodge County, Montana Territory.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

This cause came on regularly for trial on the 6th day of December, A. D. 1884.

Messrs. Dixon and Whitehill appearing as counsel for plaintiff and Sharp and Napton and Hiram Knowles, Esqrs., for the defendants, Lodge and Beaumont.

52 The default of Richard Twell, who, it appeared, had been duly served with summons, having been entered, a trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury; whereupon witnesses on the part of plaintiff and defendants were duly sworn and examined; and the evidence being closed the cause was submitted to the court for consideration; and, after due deliberation thereon, the court files its findings in writing and orders that a decree be

entered herein in favor of plaintiff in accordance therewith; whereupon, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed by the court that the sale and assignment, as alleged in plaintiff's complaint herein, by the defendant, Richard Twell, to the defendants, Joseph Lodge and Samuel Beaumont, be, and the same are, declared fraudulent and void as against this plaintiff.

It is further ordered, adjudged, and decreed that a receiver of all the property and effects of the said Richard Twell which he
53 had at the time of the entry of said decree of divorce mentioned in plaintiff's complaint herein and which said Twell, on or about the 22nd day of December, 1883, sold and conveyed to the defendants, Lodge & Beaumont, or either of them by deed or otherwise, to wit:

Certain personal property, consisting of promissory notes, Deer Lodge county scrip, credits, horses, wagons, household furniture, implements, and utensils of various kinds, adjudged to be of the value of at least $4,200.00, and the following-described real estate of the adjudged value of $600.00 or thereabouts, to wit: Lot number one (1), in block fifteen (15), and lots numbered four and five, in block number five, in the town and county of Deer Lodge, Montana Territory, said lots being numbered according to the official plat of said town on file in the office of the recorder of said Deer Lodge county, be appointed, and Howard H. Zenor is hereby appointed as such receiver; and it is further ordered, adjudged, and decreed that the defendants, the said Joseph Lodge and Samuel Beaumont,
54 account for all property received by them or either of them under either the sale or assignment before mentioned and for all proceeds arising from any or all sales thereof, and for the rents, issues, and profits thereof, and that they deliver forthwith the same and the possession thereof to the said Howard H. Zenor, as such receiver.

And it is further ordered, adjudged, and decreed that the said Howard H. Zenor shall sell the said property, both personal and real, so delivered to him, at public auction, after giving at least three weeks' notice of the time and place of said sale, by advertisement published at least once a week in some newspaper published in said Deer Lodge county, and deliver to the purchaser or purchasers thereof possession of said property so sold, and execute and deliver to such purchaser or purchasers deeds of such real property so sold, and that he pay out of the proceeds of such sales—

1. The costs and expenses of such sales and a reasonable
55 compensation to himself for his services as such receiver; and

2. All sums ordered to be paid by defendant Twell to plaintiff and now due under and by virtue of said decree of divorce above mentioned, and that said receiver hold the balance of the proceeds of said sale subject to the order of court in the above-mentioned decree of divorce between plaintiff and defendant, Richard Twell, in this court, and which said decree is of date December 18, A. D. 1883. It is further ordered, adjudged, and decreed that plaintiff have and receive of defendants, Joseph Lodge and Samuel

Beaumont, her, plaintiff's, costs of this action, taxed at $40.06, and that plaintiff have execution therefor.

Done in open court this 25th day of May, A. D. 1885.

WM. J. GALBRAITH, *Judge.*

Filed May 25th, 1885.

R. L. DAVIS, *Clerk.*

56 *Notice of Appeal.*

Title of court & cause.

To H. R. Whitehill and W. W. Dixon, Esqrs., attorneys for plaintiff:

You will hereby please take notice that the defendants, Joseph Lodge and Samuel Beaumont, in the above-entitled action hereby appeal to the supreme court of Montana Territory from the judgment entered in the above-entitled cause on the 25th day of May, A. D. 1885, in favor of plaintiff and against the above defendants, and from the whole and every part thereof.

THOMAS L. NAPTON AND
KNOWLES & FORBIS,
Att'ys for Defendants, Lodge & Beaumont.

Dated 2d day of July, 1885.

We hereby accept service of above notice of appeal and copy thereof this 2d day of July, A. D. 1885.

H. R. WHITEHILL,
Att'y for Plaintiff.

Filed July 2d, 1885.

R. L. DAVIS, *Clerk.*

57 *Undertaking on Appeal.*

In the District Court of the 2nd Jud. District in and for Montana Territory, County of Deer Lodge.

AMANDA TWELL, Plaintiff,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Defendants.

Whereas the above-named defendants, Joseph Lodge and Samuel Beaumont, have in the above-entitled action appealed to the supreme court of Montana Territory from a decree of the above court in the above-entitled action entered in the above-named district court against the above-named defendants and in favor of the above-named plaintiff on the 25th day of May, A. D. 1885, which decree set aside the sale of certain personal property and real estate in said complaint herein specified made by the said Richard Twell to said

defendants, Lodge and Beaumont, and the appointment of a receiver to take possession of said property, and for said Lodge & 58 Beaumont to deliver to said receiver the possession of said property, and for said receiver to hold possession of said property and sell the same, and to hold the proceeds of said sale for the benefit of plaintiff:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned residents and freeholders of the above county of Deer Lodge, do hereby jointly and severally undertake and promise on the part of said appellants that the said appellants will pay all damages and costs which may be awarded against said defendants, Lodge and Beaumont, on the appeal or on the dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the said appellants, Lodge and Beaumont, are desirous of staying the execution of the said decree so appealed from, we do further, in consideration of the premises, jointly and severally undertake and promise and do acknowledge ourselves jointly and severally *and severally* bound in the further sum of three thou- 59 sand dollars to the said plaintiff, and promise that the said defendants, Lodge and Beaumont, will obey the order of the appellate court as to the personal property specified in plaintiff's complaint upon appeal, and deliver or account for the same to the receiver appointed in this case; and, further, that they will not commit or suffer to be committed any waste on the real estate specified in said complaint and decree, and that if the said decree appealed from be affirmed or the appeal dismissed, they, the appellants, will pay the value of the use of said real estate and the occupation thereof from the time of the appeal until the delivery of the possession thereof; and, further, that said appellants will pay all costs and damages which may be awarded against them herein not exceeding the said sum of three thousand dollars.

Signed, sealed, and dated this the 2nd day of July, A. D. 1885.

LEWIS COLEMAN. [L. S.]
HENRY G. WARD. [L. S.]

TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

60 Lewis Coleman and Henry G. Ward, being first duly sworn, on oath doth each depose and say for himself that he is a resident and freeholder in the above Territory; that he is worth the sum of thirty-three hundred dollars over and above all liabilities and just debts, exclusive of property exempt from execution.

LEWIS COLEMAN.
HENRY G. WARD.

Subscribed and sworn to before me this the 2nd day of July, A. D. 1885.

R. L. DAVIS, *Clerk.*

Approved & filed July 2d, 1885.

R. L. DAVIS, *Clerk.*

In the District Court of the 2nd Jud. District of Montana Territory in & for Deer Lodge County.

AMANDA TWELL
vs.
RICHARD TWELL *et al.*

Upon the statement on appeal in the above-entitled cause in said court appears the following endorsement:
"Filed June 10, 1885. R. L. Davis, clerk."

61 TERRITORY OF MONTANA, } ss:
County of Deer Lodge, }

I, Reuben L. Davis, clerk of the district court of the second judicial district of said Territory in and for said county, do hereby certify that the foregoing transcript on pages 1 to 60, both inclusive, contain- a full, true, and correct copy of certain pleadings, records, and proceedings filed, made, and had in said court in a cause wherein Amanda Twell is plaintiff and Richard Twell, Joseph Lodge, & Samuel Beaumont are defendants, as therein set forth, as the same appear on file and of record in my office.

Seal of Dist. Court. Attest my hand and the seal of said court this 11th day of August, A. D. 1885.

REUBEN L. DAVIS, *Clerk.*

Filed Aug. 11, 1885.

I. R. ALDEN, *Clerk.*

62 *Proceedings in Supreme Court on Appeal.*

In the Supreme Court of Montana Territory. August Term, 1885.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

Be it remembered that in the present term of August, A. D. 1885, of said supreme court the above-entitled cause was brought into said court by virtue of an appeal taken from the judgment and decree made and entered therein in the court below and the filing of the transcript of the record of the court below in said cause in this court; and the said cause coming on to be heard before the court on the said transcript of record, the same was argued by counsel. Thereupon the court took the same under advisement.

63 And afterwards, to wit, in the term of January, A. D. 1886, of said supreme court, said cause came on for the decision and judgment on appeal of said court. The court rendered its opinion and determination therein, in writing, of which said opinion and decision, in words and figures, the following is a copy, to wit:

In the Supreme Court of Montana Territory. January Term, 1886.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL *et al.*, Appellants.

WADE, *C. J.*:

This is an appeal from a judgment. There was no motion for a new trial. The record contains the evidence, and one of the questions presented by the appellants is that the findings of fact by the court are not warranted by the evidence. There was a motion entered to strike out the evidence from the record for the reason that,
64 as there was no motion for a new trial or statement on such motion, the evidence could not be examined on this appeal. This motion is well taken. We have repeatedly held that the evidence could not be reviewed unless brought here on a motion for a new trial. The case of Chumasero *vs.* Viall, 3 Mont., 376, is in every way similar to this one in this respect, and it is not necessary to repeat that decision or to review the authorities upon which that case rests. The theory is that before the testimony can be reviewed here the lower court must have had an opportunity to have reviewed its own findings and decisions and to have corrected its own errors, and this, so far as the testimony is concerned, can only be done on motion for a new trial. Our enquiries, therefore, are limited to questions arising upon the judgment-roll, and these are: Did the court err in overruling the demurrer to the complaint? Does
65 the complaint support the judgment? Are the findings of fact and the admissions of the pleadings consistent with the judgment?

It appears by the allegations of the complaint that on the 17th day of December, 1883, the respondent (plaintiff) obtained a decree in her behalf dissolving the bonds of matrimony between herself and Richard Twell, in which it was ordered, adjudged, and decreed that said Richard Twell pay to respondent as and for her alimony the sum of fifty dollars per month during the period of her natural life or until the further order of the court, the first payment to be made on the day of the date of the decree and the subsequent payments on the same date of each month thereafter. It was further ordered and adjudged in said decree that, within fifteen days of the date thereof, the said Richard Twell give security for the payment of said alimony by executing to the respondent and filing in
66 the court a bond, with two or more sufficient sureties, in the by sum of five thousand dollars, conditioned for the payment the said Richard Twell to the respondent — said sum of fifty dollars per month, as in the said decree ordered to be paid. It was further ordered and adjudged that upon the failure of said Twell to give said bond as required that he be adjudged in contempt of court, and that such proceedings thereupon be had to enforce and secure the payment of said sums allowed as alimony as might be necessary

and proper and according to the practice of the court in such cases.

It further appears that said Richard Twell has failed to obey said decree in that he has not paid said monthly installments for alimony and has failed to give the security required; but, on the contrary, has departed the Territory without making any provision whatever for the payment of said alimony, as provided in said decree, and that his whereabouts are unknown. The complaint
67 then sets forth the amount of alimony due and unpaid at the filing hereof.

It is further, in substance, alleged that on the 22d day of December, 1883, the said Richard Twell was the owner of certain real estate and personal property amounting to the sum of $6,200.00 that on said day and after the entry of said decree of divorce and alimony the said Twell, in contemplation of a departure from the Territory for the purpose of evading the payment of said alimony and to avoid the process of *of* the court for the enforcement of said decree, made a pretended sale and assignment of his said property to the appellants (defendants), Joseph Lodge and Samuel Beaumont, by virtue of a certain deed or instrument of conveyance which is set forth in the complaint; that the property so sold and assigned is of the value of $6,200.00; that said sale and assignment was fraudulent and void as against the respondent, and was made
68 for the purpose of delaying, hindering, and defrauding her by putting it out of her power to enforce her rights under said decree; that Lodge & Beaumont knew of the said decree and knew that Twell was disposing of his property to evade the payment of said alimony; that they bought said property to enable Twell to leave the country and to prevent the decree for alimony from being enforced and to defraud the respondent of her rights under the decree, and that Twell has no other property within the jurisdiction of the court out of which said decree for alimony can be satisfied in whole or in part. There was a demurrer to the complaint overruled and an answer by appellants Lodge and Beaumont in which several of the allegations of the complaint were specifically denied and a trial before the court on the issues thus raised, the defendant, Richard Twell, making default. Upon the trial the court made the following findings of fact:

1. That the property sold by defendant Twell to defendants
69 Lodge & Beaumont was at the time of said sale of the value of at least $4,200.00, and that defendants Lodge and Beaumont have realized from the personal property sold since said sale the sum of about twenty-five hundred dollars and still have all the real estate and personal property of the value of at least $6,000.00 in their hands.

2. That the said sale to said Lodge and Beaumont was made by defendant Twell with the intention and for the purpose of hindering, delaying, and defrauding plaintiff in the enforcement of the decree mentioned in the complaint and in the collection of the money therein ordered to be paid by defendant Twell.

3. That at the time of said sale defendant Twell and said Lodge

& Beaumont were and for 8 or 10 years before had been friends and were fellow-countrymen, all being of English birth.

4. That at the time of said sale said Lodge & Beaumont knew of the decree mentioned in the complaint and of the liability of
70 defendant Twell thereunder.

5. That at the time of said sale said Lodge and Beaumont put the valuation of $1,200.00 upon the real property sold, but made no estimate of the value of the personal property and did not estimate the notes or county scrip sold, and did not know how many bonds they were to receive.

6. That at the time of said sale said Lodge and Beaumont knew that said defendant Twell could not give the bond required by the decree, and that he was at the time selling or endeavoring to sell his other personal property besides that sold to Lodge and Beaumont.

7. That said defendant Twell really left Montana Territory within two or three days after the sale to Lodge and Beaumont and has never since been within said Territory, and did not leave and has not now in said Territory any personal property whatever.

8. That the terms of the sale from said defendant Twell to
71 said Lodge and Beaumont were that they should pay Twell $3,000.00 for the whole property; that they paid Twell at the time $1,900.00 in money and $100.00 by giving said Twell credit for that amount, which he owed them, and agreed to pay the other $1,000.00 when able, no definite time for the last payment being agreed upon.

9. That after said Twell had left the country and about January, 1884, said Lodge and Beaumont paid $500.00 to Thos. L. Napton on an order from said defendant Twell.

10. That afterwards and after the commencement of this action in October, 1884, at the request of defendant Twell by letter to defendant Lodge, said Lodge went to Bismarck, in Dakota Territory, and there met said Twell and paid him the balance of $500.00 on said sale.

11. That at the time said Lodge & Beaumont paid said order to said Napton they knew that defendant Twell had absconded and sold his property to defraud plaintiff and they knew the same
72 facts and had been served with summons in this action before they made payment at Bismarck, Dakota Territory.

12. And from all the circumstances and facts in the case defendants Lodge and Beaumont, as men of ordinary prudence and sagacity, had reasonable cause to believe and know and suspect at the time of said sale to them that said Twell made said sale with intent to hinder, delay, and defraud plaintiff in the enforcement and collection of her decree herein of the money due and to become due thereon.

13. That said sale was fraudulent and void and made with intent to delay, hinder, and defraud plaintiff as aforesaid.

Thereupon the court adjudged said sale and assignment to Lodge and Beaumont fraudulent and void and ordered that all the property of Richard Twell at the date of the entry of said decree of divorce and alimony, and which was sold to said appellants, be

placed in the hands of a receiver to be by him sold and the
73 amount of alimony due to be paid and the balance of the money arising from such sale to be brought into court to await the further order thereof. According to the findings and admissions of the pleadings this is about the situation. The respondent obtained a divorce from her husband, who is required to pay to her fifty dollars per month as alimony during the period of her natural life, the payment of which the court required him to secure by executing a certain bond, but instead of complying with the order of the court, and in violation and contempt thereof, and for the purpose of cheating and defrauding the wife of her alimony, he secretly sells his property to Lodge and Beaumont, who knew of the decree and order of the court, and, helping to defeat the same and to aid in defrauding the respondent of her alimony, join in the conspiracy and purchase the property, and he departs the country, and his whereabouts are unknown. The question now is, Whether the wife having such a decree in her favor, and under such circumstances, may have said sale set aside and the property appropriated to
74 the payment of her alimony?

Our statute provides that every conveyance or assignment, in writing or otherwise, of an estate or interest in lands or in goods in action or the rents or profits thereof, made with intent to hinder, delay, or defraud creditors or other persons of their lawful debts or demands, shall be void.

Rev. Stats., sec. 172, p. 436.

It is objected to the complaint that, as it does not show there was a judgment and execution on the award for alimony, the demurrer ought to have been sustained, and therefore that a creditor's bill does not lie. It is a general rule that a court of equity will not interfere to enforce the payment of debts until the creditor has exhausted all the remedies known to the law to obtain satisfaction of the judgment. It is usually essential in order to give the court jurisdiction and to reach equitable assets that an execution should have been issued upon the judgment and returned unsatisfied. The rule
75 that the legal remedy must be exhausted by the judgment creditor before relief can be solicited to reach property not subject to the lien of the judgment is an old one.

Wait on Fraud'l't Convey., 115, sec. 75; Bump. Fraud. Con., 537; Jones *vs.* Green *et al.*, 1 Wall., 330; Smith *vs.* Rail R. Co., 99 U. S., 398; Miller *vs.* Davidson, 3 Gil., 518; 44 Am. Dec's, 715; Clarkson *vs.* Peyster, 3 Paige, 319; Brown *vs.* Long., 36 Amer. Dec's, 43; Cromplin *vs.* Anthony, 13 Allen, 36; Halbert *vs.* Grant, 4 Monroe, 580; Weightman *vs.* Hatch, 17 Ill., 281; Zell *vs.* Loper, 75 Mo., 460.

A court of equity only comes to the rescue when the remedies at law have become exhausted and have failed. The reason for this rule rests in the obvious principle of justice that a court of equity ought not to entertain a suit to set aside a conveyance until the creditor has established his claim and exhausted his remedies in that forum, for otherwise the court itself might become the instrument of fraud.

"The necessity of this first obtaining judgments at law before application is made to a court of chancery does not, however,
76 arise from the want of jurisdiction in the court of chancery to investigate fraud, but it results from the circumstance of the demand which constitutes the creditor cognizable at law and the necessity of that demand being established by the determination of a court acting within its legitimate sphere; and whenever the demand is so established the court of chancery, acting within the acknowledged sphere of its jurisdiction, will search out the fraud and clean away all obstructions to the effectual execution of the judgment at law."

Scott *vs.* McMillen, 1 Littell, Ky., 302; 13 Am. Dec's, 329.

There are exceptions to the general rule we have stated—Smith *vs.* Railroad Co., 99 U. S., 401—and one of the exceptions is that a creditor's bill may be filed to enforce a decree in equity—Bump. Fraud. Con., 539; Farnsworth *vs.* Straster, 12 Ill., 482; Clarkson *vs.* De Peyster, 3 Paige, 320; Weightman *vs.* Hatch, 17 Ill., 281—and that is the kind of a decree the respondent is seeking to enforce.

Under our statute proceedings for divorce and alimony are
77 of chancery jurisdiction. Rev. St., 513–14, secs. 505, 514.

The claim of a married woman against her husband in proceedings instituted to obtain a divorce and alimony furnish the proper foundation for a creditor's bill. Bump. Fraud. Conv., 505, and authorities cited in note, as follows: Feigley *vs.* Feigley, 7 Md., 537; Blankinsapp *vs.* Blankinsapp, 1 De G., M. & G., 595, S. C.; 12 Bead., 568, S. C.; Taylor *vs.* Wild, 8 Bead., 159; Clagett *vs.* Gibson, 3 Cranch. C. C., 359; Boiles *vs.* Boiles, 1 Cold., 284; Brooks *vs.* Caughran, 3 Head., 464; Ruffing *vs.* Tilton, 12 Ind., 259; Livermore *vs.* Boutelle, 77 Mass., 217; Turner *vs.* Turner, 44 Ala., 437; Morrison *vs.* Morrison, 49 N. H., 69; Frakes *vs.* Brown, 2 Blackf., 295; Chase *vs.* Chase, 105 Mass., 385; Boughsleugh *vs.* Boughsleugh, 68 Pa. St., 495; Kemp *vs.* Kemp, 46 How. Pr., 143; Draper *vs.* Draper, 68 Ill., 17; Bailey *vs.* Bailey, 61 Me., 361; Nix *vs.* Nix, 10 Heisk., 546; Dungan *vs.* Frisler, 69 Ind., 553.

In Bousleugh *vs.* Bousleugh, 68 Pa. St., 449, the supreme court of Pennsylvania, by Agnew, J., says: "There is no reason why
78 a wife whose husband has deserted her and refused to perform the duty of maintenance, or who by cruel treatment has compelled her to leave his house and commence proceedings for divorce and maintenance, should not be viewed as a *quasi* creditor in relation to the alimony which the law awards her. So long as she is receiving maintenance and is under the wing of her husband, as it were, she is bound by his acts as to his personal estate; but when she is compelled to become a suitor for her rights her relation becomes adverse and that of a creditor in fact, and she is not to be balked of her dues by his fraud."

In Bailey *vs.* Bailey, 61 Me., 363, the supreme court of Maine, by Peters, J., says: "The judge at *nisi prius* ruled that if the estate was conveyed to James Bailey, the father, to prevent the plaintiff (the wife) from enforcing such decree of alimony or other aid as might

be awarded her in case she should prefer a libel against him, such conveyance was fraudulent and void as between the plaintiff and defendant. The defendant contends that a person in the situation of the plaintiff could not be regarded as a creditor
79 so as to come within the statutes of Elizabeth relating to fraudulent conveyances; but the statute of 13 Eliz., c. 5, was passed "for the avoiding and abolishing of feigned covinors and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions devised and contrived of malice, fraud, covin, collusion, or guile to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, damages, penalties, forfeitures, heriots, mortmains, and reliefs."

In Livermore *vs.* Boutelle, 11 Gray, 217, in a similar suit to the present, the court say:

"If she was not a creditor she was of the others, whose just and lawful actions, suits, and reliefs would be delayed, hindered, or defeated by such conveyance."

In Chase *vs.* Chase, 105 Mass., 387, the supreme court of Massachusetts, by Morton, J., said:

"He contends that the demandant was not a creditor and her husband not a debtor within the meaning of the statutes
80 against fraudulent conveyances. The same question was raised in Livermore *vs.* Boutelle, 11 Gray, 217, and the court held that the wife, who after a divorce *a vinculo* recovered a judgment for alimony, was a creditor within the protection of the statute of 13 Eliz., c. 5, and could impeach a conveyance made by her husband to delay and defraud her. The principle is the same in the case of a divorce *a mensa et thero*. The judgment for alimony in either case creates a debt of record in favor of the wife." Allen *vs.* Allen, 100 Mass., and cases cited.

In the case of Barrett *vs.* Barrett, 5 Or., 413, the supreme court of Oregon, by Barnett, J., says: "It seems from the authorities that the right of a woman to question a conveyance made by her husband under the circumstances mentioned can never arise until the decree of divorce, which establishes the fact that she had a cause of action against her husband and fixes the time when the cause of suit arose, is made, and whenever that decree is made by a court of competent jurisdiction it arms the injured wife with power to call in
81 question the validity of any conveyance made by her husband after the cause of suit arose."

These decisions commend themselves to one's sense of natural justice, and make the statute of frauds an instrument to defeat rather than to aid in the perpetration of fraudulent practices. It is immaterial whether the decree for alimony is called a judgment or not or whether an execution might have issued thereon. It was a debt of record, ascertained by an adjudication in a court of competent jurisdiction, and the respondent thereby became a creditor within the meaning of our statute. Proceedings by attachment and the recovery of a judgment for the amount of alimony due would not have aided her in the collection of her debt or placed her in any

better or stronger position than before such proceedings had been commenced. It was not necessary to have any further proceedings or adjudication to establish the respondent's debt and claim, and a creditor's bill was her only remedy to aid her in the collection
82 of what a competent court had declared she was justly entitled to. Our statute, by the use of the words "creditors or other persons," embraces others than those who are strictly creditors. Even the word creditor does not receive a strict definition, for a party who is not, strictly speaking, a creditor may stand in the equity of a creditor and have an interest that may be defrauded.
Bump Fraud. Conv., 502.

Lodge and Beaumont, the appellants, knowingly aided Twell in evading and defeating the order and judgment of the court, and thereby placed themselves in contempt of court. They knowingly and fraudulently assisted in making nugatory a decree of the court, and compelled the respondent, in order to protect her rights and to enable her to receive what the court had decreed her, to resort to this creditor's bill to defeat their fraud. They stand in a poor plight to resist the demands of the injured wife, who comes with an adjudication in her favor, establishing the validity and justness of her claim.

The judgment is affirmed with costs.

83 Thereupon judgment on appeal was entered in said cause as follows, viz:

In the Supreme Court of Montana Territory. January Term, 1886.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

This cause coming on for the decision and judgment of this supreme court on appeal in the present term of January, A. D. 1886, on consideration it is now here ordered and adjudged by the court that the judgment and decree of the court below entered in said cause on the 25th day of May, 1885, be, and the same is hereby, affirmed, with costs; and it is hereby further ordered and adjudged by this court that said respondent recover against said appellants —— dollars for her costs herein expended and have execution therefor.

13th Jan'y, 1886.

84 And afterwards, to wit, on the 25th day of February, A. D. 1886, said appellants filed herein their motion and allowance of an appeal to the Supreme Court of the United States from the said judgment of the supreme court of Montana entered herein as aforesaid; of which said motion and allowance of appeal the following is a copy:

In the Supreme Court of Montana Territory.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

Upon the motion of Thos. L. Napton and Hiram Knowles and upon reading and considering the affidavits of Lodge and Beaumont I hereby order that the appeal of the said Lodge and Beaumont to the Supreme Court of the United States be, and the same is hereby, allowed upon the said Lodge and Beaumont exe-
85 cuting a bond to the above-named plaintiff, Amanda Twell, in the sum of $6,000.00.

D. S. WADE,
Chief Jnstice.

Dated this 25th day of Feb'y, A. D. 1886.

And on the same day, to wit, the 25th day of February, A. D. 1886, said appellants filed herein their affidavits of value or the amount in controversy in this action, of which the following is a copy, viz:

In the Supreme Court of the United States.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

TERRITORY OF MONTANA, } *ss:*
County of Deer Lodge, }

86 Joseph Lodge and Samuel Beaumont, being first duly sworn, on oath doth depose and say, each for himself and not one for the other, that the judge of the district court in and for Deer Lodge county, Montana Territory, found in the judgment and decree rendered in the above action that the personal property sold by said Twell to defendants Lodge & Beaumont was of the value of forty-two hundred dollars and that the value of the real estate sold to these defendants, Lodge and Beaumont, was six hundred dollars; that said facts will appear by the judgment and decree in this case; that the said real estate consisted of lots, upon which there were two houses which rent for thirty dollars per month; that affiants, from the time that they purchased said real estate up to the date of said judgment and decree, — they had received altogether three hundred and sixty dollars in rents from said buildings; that the value of the use of money, horses, and other property received from said Twell from the date of said sale up to the time of the rendition of
87 said judgment was one hundred and fifty dollars; that from the time of the rendition of said judgment and decree in said district court up to the date of the judgment and decree in the supreme court of Montana Territory affiants have received in rents from the said real estate three hundred and sixty dollars, and the

use of said money specified in said decree herein and of the other property from the date of the rendition of the judgment and decree in the aforesaid supreme court was and is of the value of $150.00; that the said decree requires affiants to account for all the rents, issues, and profits of all of said property, as will be seen by a reference thereto.

JOSEPH LODGE.
SAMUEL BEAUMONT.

Subscribed and sworn to before me this 13th day of February, 1866.

[NOTARIAL SEAL.] F. R. BILL,
Notary Public.

88 And on the same day, to wit, Feb'y 25, 1886, said appellants filed herein their bond on appeal as follows, viz:

In the Supreme Court of the United States.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

Appeal Bond.

Know all men by these presents that we, Joseph Lodge and Samuel Beaumont, as principals, and we, Lewis Coleman and Henry G. Ward, as sureties, all of Deer Lodge county, Montana Territory, are firmly held and bound unto Amanda Twell, of Missoula county, Montana Territory, in the sum of six thousand dollars, to be paid to the said Amanda Twell, her heirs and executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our
89 heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 13th day of February, 1886.

Whereas the above-named Lodge and Beaumont hath taken an appeal to the Supreme Court of the United States to reverse a final judgment or decree rendered in the above-entitled action by the supreme court in and for Montana Territory:

Now, therefore, the condition of this obligation is such that if the above-named Lodge and Beaumont shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOSEPH LODGE. [SEAL.]
SAMUEL BEAUMONT. [SEAL.]
LEWIS COLEMAN. [SEAL.]
HENRY G. WARD. [SEAL.]

Sealed & delivered in the presence of—
F. R. BILL,
Notary Public.

Approved:
D. S. WADE,
Chief Justice.

90 And on the same day, to wit, the 25th day of February, 1886, said appellants filed herein their petition and appeal to the Supreme Court of the United States in the following words, viz:

In the Supreme Court of the United States.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

To the honorable the Supreme Court of the United States:

The appeal of Joseph Lodge and Samuel Beaumont, the above-named defendants and appellants, respectfully s-oweth that upon the 11th day of April, 1884, the above-named plaintiff and complainant filed her complaint in the district court of the second judicial —
in and for Montana Territory, in and for Deer Lodge county,
91 said Territory, against the above-named defendants and appellants; which complaint set forth as follows:

That on the 17th day of December, 1883, at a regular term of the above district court, held at Deer Lodge county, Montana Territory, in an action in which Amanda Twell was plaintiff and Richard Twell was defendant, she obtained a decree of said district court in substance as follows: That the bonds of matrimony between Amanda Twell and Richard Twell be dissolved and they be fully divorced from each other, and that the said Richard Twell pay her, the said Amanda Twell, the sum of $50 per month during her natural life as alimony or until the further order of said district court, and that the said Richard Twell, within 15 days from the date of said decree, give security for the payment of said sum so decreed as alimony by executing to plaintiff and filing in said court a bond, with two or more sufficient sureties, in the sum of $5,000.00, conditioned for the payment of said $50 per month, and that
92 upon the failure of said Richard Twell to give said bond within said 15 days he should be adjudged guilty of contempt of court, and that such other proceedings may thereupon be had to enforce and secure the payments of said sums allowing alimony as may be necessary and proper and according to the practice of the court in such cases; that said alimony might be changed from time to time, and that said Twell pay the counsel fees of said Amanda and costs of suit; that said Richard Twell has failed to obey the said decree in this, that he has not paid the monthly installments for alimony and maintenance then due and has failed to give the said security ordered, but, on the contrary, has departed from Montana without making any provision to pay the same, and that his whereabouts are unknown to said Amanda; that there was then due from the said Richard Twell to said Amanda three monthly installments, amounting to the sum of $150.00,
93 which are wholly unpaid; that on the 22nd day of December, A. D. 1883, the said Richard Twell was the owner of and

possessed of certain real estate of the value of about $1,200.00 and of certain personal property consisting of promissory notes, Deer Lodge county scrip and credits, horses, wagons, household furniture, implements, and utensils of various kinds of the value of about five thousand dollars; that on or about the said 22nd day of December, 1883, the said Richard Twell, in contemplation of a departure from Montana Territory for the purpose of evading the payment of the sums of money ordered in said decree and to avoid the process of said district court for the enforcement of said decree, made a pretended sale and assignment of his property above named to the defendants, Lodge & Beaumont, but for what exact amount said plaintiff, Amanda Twell, did not know; that on the said 22d day of December said Richard Twell conveyed by deed to said Lodge and Beaumont lot No. one, in block fifteen, and lots four and five, in block No. five, all in the town of Deer Lodge, Deer Lodge county,
Montana Territory; that all of the above property so sold
94 and assigned was of the value of six thousand two hundred
dollars; that the said sale and assignment of said property to said Lodge and Beaumont were fraudulent and void as against plaintiff, said Amanda Twell, and were intended and made for the purpose of delaying, hindering, and defrauding her by putting it out of her power to enforce her rights under the aforesaid decree.

That said Lodge & Beaumont knew of the aforesaid decree of this court and knew that the said Richard Twell was disposing of his property to evade payment of said decree, and sold and assigned to them the said property to prevent the aforesaid decree from being enforced; that the said Lodge and Beaumont knew that the said Twell intended to leave the country to avoid the process of said district court, and bought and consented to the assignment of said property to them for the purpose of enabling the said Richard to leave the country and to prevent the said decree from being enforced and in the fraud of the rights of said plaintiff Amanda under said decree, and to hinder, delay, and defraud her in enforcing said decree.

95 That the defendant, Richard Twell, has not any property within the jurisdiction of this court other than that embraced in said sale out of which the said $150.00 now due and the other sums to become due can be made, and unless said property is so applied to the payment of the sums now due and hereafter to become due on said decree the same must be wholly unpaid; wherefore plaintiff prayed that said sale and assignment be declared fraudulent and void; that a receiver of all of said property and effects of the said Richard Twell which were sold to said Lodge and Beaumont be appointed, and that said receiver be directed to sell said property and pay said sum of $150.00 now due and all sums to become hereafter due under said decree of divorce.

That on the 22d day of April, 1884, the defendants, Lodge and Beaumont, filed their demurrer to said complaint, setting out that said complaint did not state facts sufficient to constitute a cause of action, and that the same was ambiguous and uncertain. This the court, on the 26th day of April, 1884, the aforesaid district

96 court, overruled, and the ruling — excepted to by said defendants.

On the said 26th day of April, 1884, the said defendants, Lodge and Beaumont, filed their answer to plaintiff's complaint, wherein they denied that the said Richard Twell ever, at any time, in contemplation of a departure from the Territory of Montana or otherwise or for the purpose of evading the payment of the sums of money ordered in said decree or otherwise to avoid the process of the said district court for the enforcement of said decree or otherwise, made a pretended sale or assignment of his property to the defendants, Lodge and Beaumont. They deny that the sale and assignment of the property described in plaintiff's complaint to these defendants, Lodge and Beaumont, were fraudulent or void as against plaintiff, or that the same was intended or made for the purpose of delaying, hindering, or defrauding plaintiff by putting it out of her power to enforce her rights under said decree or otherwise. They deny that defendants knew that the said defendant, Richard Twell,

97 was disposing of his property to evade payment of said decree or knew that the said defendant Twell sold and assigned to them the said property to prevent the said decree from being enforced, deny that said defendants knew that said Twell intended to leave the country to avoid the process of this court or for any purpose whatever; or that they bought or consented to the assignment of said property to them for the purpose of enabling the said Twell to leave the country, or to prevent the said decree from being enforced, or in fraud of the rights of plaintiff under said decree or otherwise, or to hinder, delay, or defraud plaintiff in enforcing said decree, or any other wrongful purpose.

And for a separate answer defendants set forth that said defendant, Richard Twell, wherever he may be, has plenty of property and funds with which to comply with the terms of said decree and out of which the same can be enforced, as defendants were informed and believe.

To which answer the plaintiff replied, denying, upon information

98 and belief, that defendant Twell had plenty or any funds or property with which to comply with the terms of said decree or out of which the same can be enforced, and that if he has any such property it is without the jurisdiction of the court.

Defendants, Lodge and Beaumont, filed an amendment to *to* their answer, denying that the property mentioned in plaintiff's complaint was worth $6,200.00 or any greater sum than $3,500.00; that upon the trial of said cause the court found—

1. That the property sold by defendant Twell to defendants Lodge and Beaumont was at the time of said sale of the value of at least forty-two hundred dollars, and that defendants Lodge and Beaumont have realized from the personal property sold since said sale the sum of about twenty-five hundred dollars, and still have all the real estate and personal property of the value of at least $600.00 in their hands.

2. That said sale to said Lodge and Beaumont was made by defendant Twell with the intent and for the purpose of hindering,

delaying, and defrauding plaintiff in the enforcement of the
99 decree mentioned in the complaint and in the collecting of the money therein ordered to be paid by defendant Twell.

3. That at the time of said sale defendant Twell and said Lodge and Beaumont were and for 8 or 10 years before had been friends and were fellow-countrymen, all being of English birth.

4. That at the time of said sale said Lodge and Beaumont knew of the decree mentioned in the complaint and of the liability of Twell thereunder.

5. That at the time of said sale said Lodge and Beaumont put the value of $1,200.00 upon the real property sold, but made no estimate of the value of the personal property, and did not estimate the notes or county scrip sold, and did not know how many horses they were to receive.

6. That at the time of said sale said Lodge and Beaumont knew that said defendant Twell could not give the bond required by the decree, and that he was at the time selling or endeavoring to sell his other personal property besides that sold to said Lodge
100 and Beaumont.

7. That said defendant Twell secretly left Montana Territory within two or three days after the sale to Lodge & Beaumont and has never since been within said Territory, and did not have and has not now in said Territory any property whatever.

8. That the terms of sale from said defendant Twell to said Lodge & Beaumont were that said Lodge and Beaumont should pay Twell three thousand dollars for the whole property; that they paid said Twell at the time $1,900.00 in money and $100.00 by giving said Twell credit for that amount, which he owed them, and agreed to pay the other $1,000 when they were able, no definite time for this last payment being agreed upon.

9. That after said Twell had left the country, and about January, 1884, said Lodge and Beaumont paid $500.00 to Thomas L. Napton on an order from said defendant Twell.

10. That afterwards and after the commencement of this action in October, 1884, at the request of defendant Twell, by letter to
101 defendant Lodge, said Lodge went to Bismarck, in Dakota Territory, and there met said Twell and paid him the balance of $500.00 on said sale.

11. That at the time said Lodge and Beaumont paid said order to said Napton they knew that defendant Twell had absconded and sold his property with intent to defraud plaintiff, and they knew the same fact, and had been served with summons in this action before they made the payment at Bismarck, D. T.

12. That from all the circumstances and facts in the case defendants Lodge and Beaumont, as men of ordinary prudence and sagacity, had reasonable cause to believe and know and to suspect at the time of said sale to them that said Twell made said sale with intent to hinder, delay, and defraud plaintiff in the enforcement and collection of her decree herein and the money due and to become due thereon.

13. That said *said* sale was fraudulent and void and made with intent to hinder, delay, and defraud plaintiff as aforesaid.

The court finds, as a conclusion of law, that plaintiff is en-
102 titled to the relief asked in her complaint.

Subsequently the defendants Lodge and Beaumont moved for a judgment on these findings of fact, but the court overruled said motion, and the said defendants, by their attorneys, excepted; that on the 25th day of May, A. D. 1885, the said district court rendered a decree in said action, wherein in substance it was adjudged that the assignment and sale made by Richard Twell to Samuel Beaumont and Joseph Lodge be, and the same is hereby, declared fraudulent and void as against plaintiff.

That a receiver of all of the property and effects of said Richard Twell which he had at the time of the entry of the decree of divorce mentioned in plaintiff's complaint, and property said Twell, on the 22d day of December, 1883, sold and conveyed to the defendants Lodge and Beaumont by deed or otherwise, be appointed; that Lodge and Beaumont account for all property received by them under said sale and assignment and for the rents, issues, and profits thereof; that Howard H. Zenor be said receiver; that they deliver forthwith the same and the possession of all of said property
103 to Howard H. Zenor, who was appointed receiver; that said receiver shall sell said property, both personal and real, at public auction after giving at least three weeks' notice of time and place; that out of the proceeds of sale there shall be paid—

1. The costs and expenses of sale, a reasonable compensation to himself for his services as receiver.

2d. There shall be paid all sums ordered to be paid by defendant, Richard Twell, to plaintiff Amanda, and now due under and by virtue of said decree above mentioned, and that the receiver hold the balance of the proceeds of said sale subject to the order of court in the above-mentioned decree of divorce; that defendants Lodge and Beaumont pay the costs of the action, taxed at $40.06.

On the — day of ——, A. D. 1885, in accordance with the provisions of the statutes of Montana Territory, the said defendants, Lodge and Beaumont, duly appealed said cause to the supreme court of Montana Territory.

104 And at the January term of said supreme court in and for Montana Territory said judgment and decree was affirmed and made final, as far as the courts of Montana Territory are concerned.

Whereupon these appellants appeal from the whole of said decree and judgment of the said supreme court of Montana Territory, and respectfully pray that the decree of said supreme court, the complaint, answer, replication, amendment of complaint, evidence, and all findings of fact and all matters set forth in the transcript and record in the said supreme court of Montana Territory and proceedings herein may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court of the United

States will proceed to hear the said cause anew or in accordance with law as provided for appeals from the supreme court of Montana Territory, and that said judgment and decree of said supreme court of Montana Territory and every part thereof may be
105 reversed and a decree be made dismissing said complaint with costs, or such other decree as to said Supreme Court of the United States shall seem just.

THOS. L. NAPTON AND
HIRAM KNOWLES,
Solicitors for Appellants.

Dated this 25th day of February, A. D. 1886.

106 *Citation.*

In the Supreme Court of the United States.

JOSEPH LODGE and SAMUEL BEAUMONT, Appellants,
vs.
AMANDA TWELL, Respondent.

[Seal Supreme Court, Montana Territory.]

Decius S. Wade, chief justice of the supreme court of the Territory of Montana, to Amanda Twell, respondent above named, and W. W. Dixon and H. R. Whitehill, her attorneys of record, Greeting:

Whereas Joseph Lodge and Samuel Beaumont, the above-named appellants, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Montana in favor of you, the said Amanda Twell, and have filed the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next, there to do and receive what by the judgment or order of said court may appertain to right and justice in this behalf.
107 Given under my hand, at the city of Helena, in the county of Lewis & Clarke, Montana Territory, this 25th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

D. S. WADE,
Chief Justice.

Service of above accepted and copy received this 1st day of March, 1886.

H. R. WHITEHILL AND
W. W. DIXON,
Att'ys for Respondent.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

Thomas L. Napton, being first duly sworn, says that he is one of the att'ys for appellants; that he this day mailed a certified copy of

the above writ to Amanda Twell, post prepaid, and delivered personally to W. W. Dixon, of counsel for respondent, a similar copy.

THOS. L. NAPTON.

Subscribed and sworn to before me this 1st day of March, 1886.

[Notarial Seal James W. Forbis, Montana.]

JAMES W. FORBIS,
Notary Public.

[Endorsed:] Original. In Supreme Court of the United
108 States. Joseph Lodge and Samuel Beaumont *vs.* Amanda Twell. Citation. Filed March 2, 1886. I. R. Alden, clerk.

109 In the Supreme Court of Montana Territory. January Term, 1886.

AMANDA TWELL, Respondent,
vs.
RICHARD TWELL, JOSEPH LODGE, and SAMUEL BEAUMONT, Appellants.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing one hundred and five pages, numbered from 1 to 105, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled cause as the same appear on file and of record in my office.

Witness my hand and the seal of said supreme court this 2nd day of March, A. D. 1886.

Seal Supreme Court, Montana Territory.

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 284. Joseph Lodge & Samuel Beaumont, appellants, *vs.* Amanda Twell. Filed January 10, 1887.

In the Supreme Court of the United States.

JOSEPH LODGE AND SAMUEL BEAUMONT, APPELLANTS,
v.
AMANDA TWELL.

No. 284.

Appeal from the Supreme Court of the Territory of Montana.

STATEMENT OF THE CASE.

This is a suit in equity, in the nature of a creditor's bill, brought in the District Court, Second Judicial District, Deer Lodge county, Montana Territory, by Amanda Twell against Richard Twell, Joseph Lodge, and Samuel Beaumont, to set aside the sale and conveyance of certain real and personal property made by said Richard Twell to the respondents, Lodge and Beaumont.

The bill alleges that on the 17th day of December, 1883, the complainant obtained in said District Court a decree dissolving the bonds of matrimony theretofore existing between her and the said Twell; that said decree awarded her alimony to the amount of fifty dollars per month during her natural life or until the further order of the court; that it was further decreed that the defendant in said suit

should within 15 days from the date of the decree give security for the monthly payment of said sum, and that upon his failure so to do he be adjudged guilty of contempt of court, and that such proceedings may thereupon be had to enforce and secure such payment as may be necessary and proper, and according to the practice of the court in such cases.

It is then averred that the defendant Twell had failed to obey said decree in that he has not paid the monthly instalments for alimony then due; that he has entirely failed to give the required security and has departed from the Territory without making any provision for payment, leaving unpaid the sum of $150. The bill then charges that on December 22, 1883, the said Twell being the owner of real estate, situated in Deer Lodge county, of the value of $1,200 and of personal property worth $5,000, and to avoid the process of the court for the enforcement of said decree, made a pretended sale and assignment of his property to the defendants Lodge and Beaumont; that said sale and assignment were fraudulent and void and were intended and made for the purpose of delaying, hindering, and defrauding the plaintiff by putting it out of her power to enforce her rights under said decree; that the defendants Lodge and Beaumont knew that said Twell was disposing of his property to evade payment of said decree, and sold and assigned the same to them for that purpose, they knowing of his intention to leave the country to avoid the process of the court, and that they made the purchase to enable said Twell to so defraud the plaintiff of her rights. The bill also alleges that the said Twell has no other property within the jurisdiction of the court other than that embraced in said sale and assignment, and that unless the said property can be applied to the pay-

ment of the sum due and thereafter to become due, the same must remain wholly unpaid.

The prayer of the bill is:

1. That said sale and assignment be declared fraudulent and void as against the plaintiff.

2. That a receiver be appointed.

3. That the defendants Lodge and Beaumont be required to account for all the property received by them under either the sale or assignment, and for all proceeds arising from any and all sales thereof.

4. That the defendant be enjoined from disposing of any of said property or interfering with the proceeds thereof.

5. That the receiver be directed to sell said property and out of the proceeds pay the $150 then due and whatever sum may be due at the time of the sale, holding the balance subject to the order of the court to be paid on the aforesaid decree. (Record, pp. 1–5.)

A decree by default was ordered to be entered against the defendant Twell. (Record, 17.)

The defendants Lodge and Beaumont filed a demurrer to the bill on the ground that it does not state facts sufficient to constitute a cause of action. (Record, 6.) This demurrer was overruled, and the defendants excepted. (Record, 14.) They also filed their separate answer, denying all the allegations of the bill touching fraud, and averring upon information and belief that the said Richard Twell, wherever he may be, has "plenty of funds and property with which to comply with the terms of said decree, and out of which the same can be enforced." (Record, 7.)

The case was heard by the court, which found that the sale made by Twell was fraudulent and void, and made with intent to hinder, delay, and defraud the plaintiff. (Record, 13.) The defendants Lodge and Beaumont moved the court, notwithstanding its findings, for judgment—

1. Because the complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed or any relief whatever. 2. Because the findings of the court do not show that the plaintiff had any lien upon any portion of the property therein sought to be subjected to plaintiff, either by attachment, or judgment, or otherwise. (Record, 13.) This motion was overruled, and the defendants excepted. (Record, 18.) A decree was then entered in favor of the plaintiff in accordance with the prayer of the bill. (Record, 19.)

That decree having been affirmed by the Supreme Court of Montana (Record, 30), the case is brought here by appeal.

Assignment of Errors.

The appellants say that the court below erred:

1. In sustaining the action of the District Court in overruling the defendants' demurrer to the bill of complaint.

2. In sustaining the decree of the District Court in the absence of any process issued on the decree awarding alimony to the plaintiff, or of any proceeding by her to establish her claim at law or the measure of her demand.

3. In holding that the decree of the District Court of the Second Judicial District of Deer Lodge county, Montana, dissolving the bonds of matrimony between Amanda Twell and Richard Twell, upon which this suit was founded, constituted a debt of record for the enforcement of which a creditor's bill in equity lies at the suit of said Amanda Twell.

4. In finding and holding that no further proceedings or adjudication other than said decree was necessary to establish the complainant's debt and claim, and to enable her to maintain this suit.

5. In not reversing the decree of the District Court, and relegating the complainant to her action at law.

ARGUMENT.

The defendants' demurrer to the bill of complaint was well founded, and should have been sustained. There is no allegation anywhere in the bill of complaint that any process had ever issued on the decree for alimony or that any proceedings at law had ever been instituted to recover any sum from the said Twell. The doing of the one or the other of these things was an essential prerequisite to the filing of a creditor's bill against the defendants Lodge and Beaumont to subject the property in their hands to the payment of any sum due the complainant.

It is a general principle, that courts of equity acquire jurisdiction to aid *legal* remedies, when it appears that without such assistance the *legal* process is insufficient, and that with such assistance beneficial relief can be rendered. But courts of equity have no jurisdiction to enforce the payment of *debts*. All that equity is capable of doing is, to aid in the enforcement of the judgment at *law*.

Payne *v.* Sheldon, 63 Barb., 169.

State Bank *v.* Knox, 1 Dev. & Bat., Eq. 55.

The debt which is sought to be enforced by creditor's bill must be clear and undisputed.

Public Works *v.* Columbia College, 17 Wend., 521.

Powell *v.* Howell, 63 N. C., 283.

Fox *v.* Moyer, 54 N. Y. (9 Lick.), 125.

Pendleton *v.* Perkins, 49 Mo., 565.

It is the general rule that a creditor must first exhaust his legal remedies before a court of equity will interpose for his relief, and the only evidence of that fact that will be received by the rules of law is a judgment, execution, and return *nulla bona*.

Payne *v.* Sheldon, 63 Barb., 169.
Turner *v.* Adams, 46 Mo., 95.
Public Works *v.* Columbia College, 17 Wall., 521.
Newman *v.* Willetts, 52 Ills., 98.
Bassett *v.* St. Albans, etc., Co., 47 Vt., 313.
Tyler *v.* Peatt, 30 Mich., 63.
Rambaut *v.* Wayfield, 1 Hawk. (N. C.), 95.
Miller *v.* Miller, 7 Hun. (N. Y.), 208.
Dunlevy *v.* Tallmadge, 32 N. Y., 457.
Cubbedge *v.* Adams, 42 Ga., 124.
Peyton *v.* Lamar, *Id.*, 131.

Before a creditor can impeach a transfer he must have an execution, attachment, or some other legal process which authorizes the seizure of the property.

Andrews *v.* Durant, 18 N. Y., 496.
Rinchey *v.* Strykes, 26 How. Pr., 75.
Schlussin *v.* Willett, 32 Barb., 615.
Tiffany *v.* Warren, 37 *Id.*, 571.
Frost *v.* Watt, 34 N. Y., 253.
Frisbie *v.* Thayer, 25 Wend., 396.
Allen *v.* Camp, 1 Monroe, 231.

A bill in equity will not lie on behalf even of judgment creditors to subject real property of their debtor, held by a third party upon a secret trust for him, to the satisfaction of their judgment, until a fruitless attempt has been made for its collection by execution at law.

Jones *v.* Green *et al.*, 1 Wall., 330.
See Grimsby *v.* Hooker, 3 Jones (N. C.), Eq. 4.
Farnia *v.* Hains, 20 Miss., 366.
Rice *v.* Barnard, 20 Vt., 479.

The allegation of the bill of complaint that, unless this

property is subjected to the payment of the sums which may become due the complainant as alimony, the same must remain wholly unpaid, is not sufficient to attach the jurisdiction of a court of chancery. So the mere fact that a debtor is insolvent, and that without an injunction the debt will be lost, is not sufficient to sustain an allegation that the creditor has no adequate remedy at law.

Hall *v.* Joiner, 1 So. Car., 186.

It is true that a creditor who has a *lien* may come into equity to remove an obstacle in his way or a cloud over the title to the property without first exhausting his legal remedy, but in the case at bar the allegation of the bill of complaint is that the plaintiff "has no security for the payment" of what she claims, and hence has no lien and is without remedy in a court of chancery.

In *Marcum* v. *Coleman* (8 Montana, 196), the court held that in order to justify the taking of property by a creditor, he must show his interest and a lawful right to the same, either by an attachment properly issued or upon an execution based upon a valid judgment.

In the opinion of the court below, Livermore *v.* Boutelle, 11 Gray, 217; Chase *v.* Chase, 105 Mass., 385; Bouslaugh *v.* Bouslaugh, 68 Penn. St., 495; Barrett *v.* Barrett, 5 Oregon, 413; Farnsworth *v.* Strasler, 12 Ills., 482; Weightman *v.* Hatch, 17 *id.*, 281, and Frakes *v.* Brown, 2 Blackford, 295, are cited to sustain the position that a wife may proceed by creditor's bill, notwithstanding nothing whatever had previously been done under the decree awarding alimony to her, but an examination of those cases will show that in every one of them process, either by way of attachment or execution, had issued and was returned unsatisfied.

That a divorced wife to whom alimony has been awarded

may have the remedies for the collection of the amounts awarded, which are by law open to all creditors, is not in question; but such creditor is not exceptionally privileged.

The award of alimony in the case of Twell *v.* Twell was a part of the proceedings in the suit for divorce. It was a decree in chancery, operating on the defendant *in personam*. There was not in that cause any judgment or order which purported to bind by attachment, sequestration, or otherwise the property of the defendant in the case, or which imparted notice that said property was held for its satisfaction, or that implied or imposed any impediment to its sale or transfer. It definitely determined the amount and character of the security to be given by the defendant to insure its payment, and reserved jurisdiction to take further order under that decree for its complete enforcement.

The appellants insist therefore that the said decree of the District Court rendered in the divorce proceeding is not a lien on any property which the defendant might own, and is not therefore enforceable by a creditor's bill in chancery. It is true that said decree awards the wife alimony in given monthly sums and requires the defendant, under pain of being adjudged guilty of contempt, to give security for their payment, but it is equally true that on the face of the decree the securing and enforcement of payment was to be not by the bringing of a creditor's bill in an independent suit, but under the "practice of the court in such cases," viz., by the issue of appropriate process in that suit to enforce the decree.

No such process having been issued, and no attempt made to enforce that decree, the proper basis or foundation for a creditor's bill is wanting, and the demurrer to the complaint was well taken.

The plaintiff in that suit, the appellee here, having failed

to resort to, or avail herself of, the process of the court in the divorce suit, stands in the same position as any general creditor of Twell, and is bound by the rules applicable to them.

Adler *v.* Penton, 24 How., 407.
Smith *v.* Fort Scott, H. & W. R.R. Co., 99 U. S., 398.
Jones *v.* Green, 1 Wall., 330.
Tayler *v.* Bowker, 111 U. S., 110.
Day *v.* Washburn, 24 How., 352.

It is therefore submitted that the decree below was erroneous and that it should be reversed.

S. S. BURDETT,
Attorney for Appellants.

Office Supreme Court U. S.
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MAR 18 1890
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 284.

JOSEPH LODGE AND SAMUEL BEAUMONT,
APPELLANTS,

VS.

AMANDA TWELL, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF OF ARGUMENT FOR APPELLEE.

JAS. I. BROWNSON, JR.,
of Counsel for Appellee.

IN THE

Supreme Court of the United States.

NO. 284, OCTOBER TERM, 1889.

JOSEPH LODGE AND SAMUEL BEAUMONT,
APPELLANTS,

VS.

AMANDA TWELL, APPELLEE.

STATEMENT.

This case is brought here on Appeal from the Supreme Court of the late Territory of Montana. Judgment was entered in that Court January 13, 1886, affirming the decision and decree of the court below, made and entered in favor of the appellee on the 25th day of May, 1885.

It is an action in equity to set aside a sale of certain property made by one Richard Twell, (a defendant in the trial court, but who made default, which was properly entered December 6, 1884: printed record, p. 17,) to the appellants, Lodge and Beaumont, on the ground that the same was fraudulent and made with intent to defraud the appellee of her claims and demands for alimony awarded her by decree of

divorce, and to have the property applied to the payment of said alimony according to said decree.

BRIEF OF ARGUMENT FOR APPELLEE.

I.

The decree appealed from in this case is not appealable, and this court is without jurisdiction to review it.

Sections 702 and 1909, U. S. Rev. Stat., give to this court jurisdiction to review the "final judgments and decrees" of the territorial Supreme Court, where the matter in dispute, exclusive of costs, exceeds one thousand dollars. By the act of March 3, 1885, ch. 355, (23 St. 443,) the jurisdictional limit is raised so as to require that the matter in dispute shall exceed $5,000, exclusive of costs.

The judgment or decree of a territorial court must be a final one, to be reviewable: Phillips' U. S. S. C. Pr., p. 475; Harrington v. Holler, 111 U. S. 796. To be final for the purposes of appeal, it "must leave the case in such a condition that if there is an affirmance here, the court below will have nothing to do but to execute the decree it has already entered;" if any accounting remains to be done before the matter in controversy can be finally disposed of, there is no final decree: Dainess v. Kendall, 119 U. S. 53.

The decree in question here is not a final decree. In the Supreme Court of Montana there was entered simply an order affirming a decree of the district court for the second judicial district of Montana. The decree in the district court (page 20 of printed record) may be thus summarized: (1,) The sale and assignment from Richard Twell to Lodge and Beaumont of various items of real and personal property, (the identity and quantity of which are not fixed except as

to the real estate,) are adjudged fraudulent and void as against the plaintiff; (2,) A receiver of the property so sold and assigned is appointed; (3,) The defendants, Lodge and Beaumont, are ordered to account for all said property, for all proceeds of any sale or sales thereof by them made, and for the rents, issues and profits thereof, and deliver the same and possession thereof to the receiver; (4,) The receiver is ordered to sell the property so delivered to him, to pay out of the proceeds of sale the expenses of the receivership and the alimony due to the plaintiff at the date of the decree, and to hold the balance of such proceeds subject to the order of the court; (5,) It is ordered that said defendants pay the costs and the plaintiff have execution therefor.

This decree is not final for the following reasons:

1. It leaves for future ascertainment what Lodge and Beaumont are to turn over to the receiver. The decree does not identify, or even enumerate, all the items of property in the hands of Lodge and Beaumont and to be delivered to the receiver by them. The findings of the court, (printed record, page 12,) include a finding that Lodge and Beaumont had made sales of part of the personal property transferred to them by Richard Twell, and had realized therefrom "about twenty-five hundred dollars," but the exact amount of the proceeds thereof is not determined. The decree orders them to account for the proceeds of all such sales. It also orders that they account for the rents, issues and profits of all the property transferred to them, and there is no ascertainment, either in the decree or in the findings of fact, of the amount of such rents, issues and profits. These orders thus necessitate the taking of an account with these defendants before the extent of their liability under the decree can be determined and the principles upon which the account is to be stated are not laid down. Such accounting may involve questions both of fact and of law, and give rise to an appeal from their adjudication. The whole matter in controversy has thus not been disposed of.

2. The decree does not award to the plaintiff more than a small part of the amount to be collected by the receiver. The alimony accruing between December 18, 1883, and May 25, 1885, the date of the decree, at the rate of $50 per month, is directed to be paid to her, but the bulk of what he is to collect the receiver is to hold subject to the further order of the court. A decree that the plaintiff have execution for the sum reported in the hands of executors, and that uncollected debts due the estate of their testator be paid into court when collected, for distribution under the direction of the court, was held in Young v. Smith, 15 Pet. 287, not to be a final decree from which an appeal could be taken. Nor does the imposition of costs upon the defendant convert the decree into a final one: Young v. Grundy, 6 Cranch, 51.

3. As to the sums presently given to the appellee, for accrued alimony, even if the decree were to be regarded as final to that extent, the amount awarded is below the jurisdictional limit which must be reached in order to authorize an appeal. We might even concede that both as to accrued alimony and also so far as the setting aside of the conveyance of the real estate is concerned, the decree is to be treated as final, without conceding enough to support the appeal. If, to go still further, it were conceded that as to everything contained in it except the order for an account of the proceeds of sales of personal property, and the rents, issues and profits of realty and personalty, the decree is to be treated as a final one, the amount involved in the part of the decree so to be treated as final is less than $5,000. (See par. 1 of findings of facts, page 12; adjudication of value in decree, page 20, and appellant's affidavit of value, page 31, of printed record.) In fact, however, the decree cannot be treated as final as to any of the personal property, because the nature and the extent of the liability of the appellants, in respect thereof, depend entirely upon facts to be ascertained in the future, upon the accounting. The articles of property which still remain in their hands, and are therefore to be delivered to the receiver in

specie, are not identified, enumerated, or in way ascertained by the decree or findings, and the amount of money with which they shall be charged upon the accounting, as representing property which they no longer have in their possession in specie, is equally dependent upon the facts to be ascertained when the account is taken, though it is evident that as to the greater part of the $5820, which is the aggregate of the items specified in the appellants' affidavit of value, the decree is purely an interlocutory one, preparatory to a further and final decree for the payment of money.

The real estate is the only part of the property about which there is any identification or specification, or any definite order capable of execution without the ascertainment of further facts and a further decree. The personal property, to be delivered to the receiver, not being "ascertained and defined," and the amount of money to be paid him being entirely undetermined, no part of the decree, other than that which relates to the title and possession of the real estate, can in any event be regarded as final: Railroad Company v. Swasey, 23 Wall. 405. But the real estate was valued by the court only at "$600 or thereabouts." If, therefore, this portion of the decree should be held to come within the doctrine of Forgay v. Conrad, 6 How. 201, as explained in Craighead v. Wilson, 18 How. 199, and Beebe v. Russell, 19 How. 283, it is not appealable for want of a sufficient sum in controversy therein.

II.

If this court has jurisdiction, then the decree of the Supreme Court of Montana ought to be affirmed.

Aside from the question of jurisdiction, the appellee claims that the only point to be considered in this appeal is whether or not the complaint states facts sufficient to constitute a cause of action. The defendants, by their appeal, ask

that the decision of the territorial Supreme Court, passing upon the assignments of error presented to it, be reversed. The only question raised by the present appeal is, therefore, did that court err in not sustaining those assignments. Their effect is well stated by Wade, C. J., in his opinion: page 24 of printed record. The points raised by them are all resolvable into the single one, whether the record shows that the appellee had a cause of action for the relief in chancery which the decree of the district court granted her.

A suit for divorce and alimony in Montana is a proceeding in chancery (Compiled Laws 1887, page 921, sec. 1006) and the decree brought here by this appeal was rendered in a supplemental suit in equity, in the same court, brought in aid of and to enforce the decree for alimony.

The decree for alimony was not a judgment upon which an execution could be issued against the property of the defendant. It was a personal decree requiring defendant Twell to do certain acts under a penalty of being adjudged in contempt of court.

This decree of divorce even if irregular cannot be collaterally attacked in this present proceeding.

If any docketing of the decree for alimony were required, it must be presumed that it was properly docketed for it was the duty of the clerk to docket it (Revised Statutes of Montana, p. 96, sec. 296,) and this court must presume that the officer performed his duty.

III.

The main point made by the appellants seems to be that the complaint does not allege that any execution was issued on the decree for alimony or any return of *nulla bona* made.

The substance of this point is, that appellee could not not go into equity for relief until she had exhausted all legal

remedies, and that this could only be shown by the issuance and return unsatisfied of an execution.

Appellee's answer to this is:

First—No execution could have been issued upon the decree for alimony.

Second—It is alleged in the complaint that the defendant Twell had departed from the Territory of Montana and had sold the property, here in controversy, with intent to evade and defeat the decree for alimony, and that he had no other property out of which said decree could be satisfied; these allegations were not denied by the appellants in their answer, and they show as conclusively as an execution returned unsatisfied could do, that the appellee was without remedy at law to enforce her rights and that an execution even if one could have been issued would have been useless. The law does not require parties to do vain and useless things: Brown v. Long, 1 Ired. Eq. 190; 36 Am. Dec. 43; Smalley v. Mass, 72 Iowa, 171.

Third—Even if execution process at law could have been employed, it would be an utterly inadequate and ineffectual remedy. It could be issued for no more than such amount as was due under the decree at the date of issue, and, as already stated, the record shows it would have been ineffective for the collection of even that. With the aid of the appellants Twell succeeded in weaving a web of fraud which effectually barred the way of his injured wife to the realization of any part of the fruits of her decree, present or prospective, otherwise than through the aid of a court of equity. Leaving out of view the alimony that was due at the time the present chancery proceeding was instituted, must she stand by and see the decree providing for her future maintenance rendered wholly abortive, because the appellants, whether on account of greed for gain or for other motives, became particeps criminis with her husband in his attempt to evade it, and aided him to do so by purchasing this property at an under value and under circumstances showing on their face that the purchase was not a bona fide transaction? In contempt of court

Twell absconded before the expiration of the time allowed him for giving bond. The defendants knowingly aided him to put all his property out of his hands. Thus the whole decree is rendered futile unless the court which rendered it can unravel the fraud and impound the property, conveyed for the very purpose of rendering the decree of no avail; and can do this before the appellants complete the work of converting the property into cash, so as to leave nothing tangible to be seized—a work which they promptly set about. Surely our jurisprudence is not so defective as to require a court of equity to calmly fold its hands and look on, while conspirators combine to set its decrees at defiance.

Fourth.—The appellee admits that the general, although not universal rule, is that when the plaintiff or creditor has a judgment at law, he must have an execution issued thereon and returned unsatisfied before he can resort to equity; but this rule only applies to judgments at law upon which executions can be issued.

In this case there was no judgment at law nor any arrearages of alimony upon which a judgment might have been had or writ of attachment issued. The first installment of alimony due as alleged in the complaint was on January 17th, 1884, (printed record, page 3.) Twell absconded and left the Territory of Montana about the 25th day of December, 1883, and the sale which this suit was brought to set aside was made on the 22nd day of the same month; (see Beaumont's testimony, printed record, page 11, and findings of fact No. 7, page 12.) Thus before the first installment of the appellee's demand fell due, Twell was an absconding debtor who had conveyed away all his property. This property the appellants held as trustees ex maleficio for the appellee: Christy v. Sill, 95 Pa. 380. As the absconding debtor left no legal assets behind him, the appellee had a right to file her bill for the purpose of reaching the assets so held by the appellants: Wait on Fraud. Conv. §84.

Fifth.—But this case is not merely an exception to the general rule; it is entirely outside of it.

It is only a creditor whose demand is purely legal who must first obtain a judgment and execution at law before resorting to equity: Bump Fraud. Convey., p. 540; note to Sexton v. Wheaton, 1 Am. Lead. Cas. *54; Scott v. McMillen, 1 Littell 302; 13 Am. Dec. 239; Halbert v. Grant, 4 Monroe 580; Barrett v. Barrett, 5 Oregon 411.

To reach an equitable estate of the debtor not subject to execution at law the creditor must first obtain judgment and execution, but a judgment only is necessary to maintain an action in equity to set aside a fraudulent conveyance of property subject to execution: Weightman v. Head, 17 Ill. 281; Zoll v. Loper, 75 Mo. 460; Miller v. Davidson, 44 Am. Decisions 715; Clarkson v. De Peyster, 3 Paige 319; Brown v. Long, 36 Am. Decs. 43; Crompton v. Anthony, 13 Allen 33; Bump Fraudulent Conveyances p. 537; and cases there cited.

This action was only an equitable one in aid of and to enforce the previous decree in equity of the same court and to prevent that decree from being defeated by the fraudulent acts of the defendants, and certainly a court of equity has power to grant such relief and enforce its own decree. The territorial statute not only makes cases of divorce and alimony a matter of chancery jurisdiction, to be taken cognizance of by the district court "sitting as a court of chancery," but provides expressly that "the like process, practice and proceedings" shall be had "as they are usually had in other cases of chancery." Not only the power, but the duty, to grant all sorts of process, all forms of remedy, which a court of chancery uses to prevent the frustration of its decrees, and to grant them in the same circumstances, is this clearly reposed in the territorial district court, when sitting as a divorce court.

IV.

The appellee is a creditor within the statute and entitled to maintain this action: Revised Statutes, Montana, p. 436,

sec. 172; Bump Fraudulent Conveyances, (3d ed.,) pp. 502–505; and cases cited on page 505, note 6; 2d Bishop, Marriage and Divorce, sec. 450; Greer v. Wright, 52 Am. Dec. 115; see note to same and cases cited.

She is such as to the monthly alimony hereafter to become payable, as well as to the installments already matured. To constitute one such a creditor it is not requisite that the claim be due: Mott v. Danforth, 6 Watts 304; Cook v. Johnson, 12 N. J. Eq. 51; Howe v. Ward, 4 Me. 195.

It may even be a claim payable after the death of the debtor: Adames v. Hallett, L. R., 6 Eq. 468; Rider v. Kidder, 10 Ves. 360.

Or may be a contingent claim: McLaughlin v. The Bank, 7 How. 220; Cook v. Johnson, 12 N. J. Eq. 51; Manhattan Co. v. Osgood, 15 Johns. 162; Van Wyck v. Seward, 18 Wend. 365; Shontz v. Brown, 27 Pa. 123, 131.

James I. Brownson Jr.,
Counsel for appellee.